123-623

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. ~~701~~. 475 ~~21F~~ 20

PETER MUGLER, PLAINTIFF IN ERROR,

vs.

THE STATE OF KANSAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED NOVEMBER 16, 1883.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 791.

PETER MUGLER, PLAINTIFF IN ERROR,

vs.

THE STATE OF KANSAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

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[illegible], PRINTERS, WASHINGTON.

1 UNITED STATES OF AMERICA, } ss:
State of Kansas, }

To the Hon. A. H. Horton, chief justice of the supreme court of the State of Kansas:

Your petitioner, Peter Mugler, a citizen of Kansas, would respectfully represent that at the January term, 1883, of the said supreme court of the State of Kansas, in the suit of The State of Kansas *vs.* Peter Mugler, this petitioner, judgment was rendered against the defendant, and that this judgment is rendered by the court of final appellate jurisdiction within and for said State.

Your petitioner further states that the proceedings in said suit so had involve the validity of a constitutional enactment of the said State of Kansas, and of a statute of said State, the defendant claiming that said constitutional enactment and statute are in violation of the Constitution of the United States, and the judgment of said supreme court of the State of Kansas was in favor of the validity of said enactment and statute, as appears by the certified record of said supreme court herewith exhibited.

Your petitioner prays that upon inspection of the record he be granted a writ of error to the Supreme Court of the United States in said cause, in order that the error, if any, in the proceedings and judgment of said supreme court of Kansas may be corrected.

GARVER & BOND,
G. G. VEST,
Att'ys for Mugler.

[Endorsed:] Filed Apr. 12, 1883. C. J. Brown, clerk sup. court.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the chief justice and associate justices of the supreme court of the State of Kansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said supreme court of the State of Kansas, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had, in the said suit between The State of Kansas, plaintiff, and Peter Mugler, defendant, wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of such their validity; and wherein was drawn in question the construction of a clause of the Constitution of the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, a manifest error hath happened to the great damage of the said Peter Mugler, defendant, as by his complaint appears:

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that

then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there
3 held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 11th day of April, in the year of our Lord one thousand eight hundred and eighty-three.

Issued at office in the city of Topeka, with the seal of the circuit court of the United States for the district of Kansas, dated as aforesaid.

[SEAL.] A. S. THOMAS,
Clerk of the Circuit Court of the United States for the District of Kansas.

Approved, this 11th day of April, 1883.

ALBERT H. HORTON,
Chief Justice of the Supreme Court of the State of Kansas.

[Endorsed:] Peter Mugler, plaintiff in error, *vs.* State of Kansas, defendant in error. Writ of error. Filed Apr. 12, 1883. C. J. Brown, clerk sup. court.

4 The United States of America to the State of Kansas, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Kansas, wherein Peter Mugler is plaintiff in error and The State of Kansas is defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness Honorable Albert H. Horton, chief justice of the supreme court of the State of Kansas, this 11th day of April, 1883.

ALBERT H. HORTON.

5 TOPEKA, KANSAS.

Service of the within citation upon the undersigned is hereby acknowledged, this the 24th day of April, A. D. 1883.

G. W. GLICK,
Governor of the State of Kansas.

W. A. JOHNSTON,
Attorney General.

[Endorsed:] Peter Mugler, pl'ff in error, *vs.* State of Kansas, def't in error. Citation. Filed Apr. 12, 1883. C. J. Brown, clerk sup. court.

6 Know all men by these presents, that we, C. C. Burnes, S. C. King, and H. Clay Park, are held and firmly bound unto the State of Kansas in the full and just sum of two hundred dollars, to be paid to the said State of Kansas; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this 11th day of April, 1883.

Whereas lately, at the January, 1883, term of the supreme court of the State of Kansas, in a suit depending in said court between The State of Kansas, plaintiff, and Peter Mugler, defendant, judgment and decision was rendered against the said Peter Mugler; and the said Peter Mugler having obtained a writ of error to the Supreme Court of the United States, and filed a copy thereof in the clerk's office of said court to reverse the decision and judgment in the aforesaid suit, and a citation directed to the said State of Kansas, citing and admonishing — to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such, that if the said Peter Mugler shall prosecute his writ to effect, and answer all damages and costs if he shall fail to make his plea good, then the above obligation to be void; else to remain in full force and effect.

C. C. BURNES. [SEAL.]
S. C. KING. [SEAL.]
H. CLAY PARK. [SEAL.]

Approved, this April 11th, 1883.

ALBERT H. HORTON,
Chief Justice of the Supreme Court of the State of Kansas.

[Endorsed:] Bond. Filed Apr. 12, 1883. C. J. Brown, clerk sup. court.

7 In the Supreme Court of the State of Kansas.

THE STATE OF KANSAS, Plaintiff,
vs.
PETER MUGLER, Defendant. } 2623.

Be it remembered that on the thirty-first day of May, A. D. 1882, there was filed in the office of the clerk of the supreme court of the State of Kansas a certified copy of the pleadings and record in said cause from the district court of the county of Saline, which is in words and figures as follows, to wit:

8 STATE OF KANSAS., *Saline Co.:*

In the District Court of said County, State of Kansas.

STATE OF KANSAS, Plaintiff, *vs.* PETER MUGLER, Defendant.

Be it remembered that in the above-entitled case, and on the 29th day of November, A. D. 1881, there was filed in said court an indictment in words and figures as follows, to wit:

Indictment.

STATE OF KANSAS, } ss:
County of Saline, }

In the District Court of Saline County, State aforesaid.

STATE OF KANSAS, Plaintiff, *vs.* PETER MUGLER, Defendant.

The jurors of the grand jury selected, impanelled and sworn, in and for the body of said county, charged to inquire of offenses committed within the said county of Saline, in the name and by the authority, and on behalf of the State of Kansas, do, upon their solemn oaths, find and present that one Peter Mugler, late of the county of Saline and State of Kansas, and within the jurisdiction of this court, on, to wit, the first day of November, A. D. 1881, in the county of Saline, in the State of Kansas, did unlawfully manufacture, and aid, assist, and abet in the manufacture, of vinous, spirituous, malt, fermented, and other intoxicating liquors in violation of the provisions of an act entitled An act to prohibit the manufacture and sale of intoxicating liquors, except for medical, scientific, and mechanical purposes, and to regulate the manufacture and sale thereof for such excepted purposes, approved February 19, A. D. 1881, he, the said Peter Mugler, then and there not having taken out and having a permit to manufacture intoxicating liquors as provided by law, contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Kansas.

H. S. CUNNINGHAM,
County Attorney.

(Endorsed:) State of Kansas, pl'ff, *vs.* Peter Mugler, defendant. Indictment. A true bill. T. J. Going, foreman. Witnesses: George Mugler, J. B. Criswell, T. H. Doirs, O. Barnes, Evander Light, W. C. Tuthill, J. M. Postlewait, Chas. Lour, Phil. Rineman, P. H. Reel, Albert Rose, Chas. Holinquist, A. J. Holinquist. Filed 29 day of Nov., A. D. 1881. Joseph Moore, clerk of district court.

Motion to quash was filed as follows:

Motion to Quash.

In the District Court of Saline County, Kansas.

STATE OF KANSAS, Plaintiff, }
vs. } No. 289.
PETER MUGLER, Defendant. }

Comes now said defendant and moves the court to quash the indictment filed herein for the reasons following:

1. That said indictment does not contain facts sufficient to constitute any offense under the laws of the State of Kansas.

2. Said indictment contains a double charge, in that in the same count said defendant is charged with manufacturing, and also with aiding, assisting, and abetting in the manufacture of, certain
9 liquors, and is bad for such duplicity.

GARVER AND BOND,
Attorneys for Defendant.

The entry of the ruling of the court upon the motion to quash is in words as follows:

Journal Entry.

In the District Court of Saline County, Kansas.

THE STATE OF KANSAS, Plaintiff, *vs.* PETER MUGLER, Defendant.

And now on this 5th day of December, 1881, comes the plaintiff, by H. S Cunningham, county attorney, and J. G. Mohler, of counsel, and the defendant in person and by Garver and Bond, his attorneys, and thereupon the said defendant made his motion to quash the indictment herein, which was argued by counsel; and the court, being fully advised in the premises, overruled the said motion; to which ruling of the court the said defendant duly excepted.

On the 19th day of December, 1881, said defendant made and filed his plea to the indictment, which is in the following words and figures:

Plea.

In the District Court of Saline County, Kansas.

STATE OF KANSAS, Plaintiff,
vs.
PETER MUGLER, Defendant. } No. 289.

And now comes the defendant, Peter Mugler, and for plea to the indictment in this cause says: That prior to and ever since the year 1876 he was, and is now, a citizen of the United States and of the State of Kansas. That in the year 1877 he erected and furnished a brewery in the city of Salina, Saline county, Kansas, at an actual outlay and expense of ten thousand dollars ($10,000), and that he has been since that time, and now is, the owner of said property. That said property was specially constructed and is adapted for use as a brewery; that being so specially constructed and adapted, the same is nearly valueless for any other purpose, so that while it is worth the sum of ten thousand dollars ($10,000) for the purposes for which it was constructed, it is worth not to exceed three thousand dollars for any other purpose.

Said defendant further alleges that whatever liquors were manufactured by him, as charged in said indictment, were manufactured at and in the due course of the business of said brewery, and for the purpose of enjoying the use and benefit of such property.

Wherefore the said defendant says that the act under which this prosecution is instituted, so far as it affects him in the use of such property, without compensation for any damage done thereto, [is] unconstitutional, null, and void.

GARVER AND BOND,
Att'ys for Defendant.

On the 4th day of January, 1882, the entry upon the record of the proceedings had upon the trial of said case, and of the judgment of the court, was made as follows:

Journal Entry. Trial and Judgment.

STATE OF KANSAS, Pl'ff,
vs.
PETER MUGLER, Defendant. } No. 289.

On this day, this cause coming on for trial, the State appeared by H. S. Cunningham, county attorney, and J. G. Mohler, of counsel, and the defendant in person, as well as by Garver and Bond, his attorneys, and thereupon a trial by jury being waived, the issues herein raised by the indictment, and defendant's plea of not guilty thereto, are submitted for trial to the court upon an agreed statement of facts; and after argument by counsel, and due consideration by the court, the court determines the said issues in favor of the State, and finds the defendant guilty of manufacturing intoxicating liquors in manner and form as charged in the indictment.

Said defendant thereupon, and before judgment, made and filed his written motion for a new trial, which was argued by counsel, and by the court overruled; to which ruling said defendant duly excepted at the time. Said defendant thereupon made and filed his written motion in arrest of judgment, which was argued by counsel, and by the court overruled; to which ruling said defendant duly excepted at the time. Said defendant having no further cause to show why judgment should not be pronounced, it is ordered and adjudged by the court that said defendant do pay a fine of one hundred dollars, and the costs herein taxed at $——, and that he be committed to the county jail until the same are paid.

And now upon the rendering of said judgment, and at the same term, said defendant presents his certain bill of exceptions taken on the trial of this cause, and the same is allowed and signed and ordered to be placed on file with the records in this case, and made a part thereof.

On application of said defendant it is further ordered by the court that on appeal of this case to the Supreme Court a stay of the execution of this judgment may be had by the execution by said defendant of an undertaking in the sum of two hundred dollars, with one or more sureties, to be approved by the clerk of this court, conditioned for his appearance in this court upon the return of a mandate of the Supreme Court affirming this judgment, then and there to abide by the same.

The motion for a new trial, made and filed on the 26th day of December, 1881, is as follows:

Motion for New Trial.

In the District Court of Saline County, Kansas.

STATE OF KANSAS, Plaintiff, *vs.* PETER MUGLER, Defendant.

Comes now said defendant and moves the court to grant a new trial herein for the following reasons:

1. The decision of the court is contrary to the evidence.
2. The decision of the court is contrary to law.

GARVER AND BOND,
Att'ys for Def't.

Also on December 26, 1881, was filed a motion in arrest of judgment, as follows:

Motion in Arrest of Judgment.

In the District Court of Saline County, Kansas.

STATE OF KANSAS, Plaintiff, *vs.* PETER MUGLER, Defendant.

Comes now said defendant and moves the court to arrest judgment herein upon the finding of guilty for the following reasons:

1. That the facts stated in the indictment do not constitute a public offense.

11 2. The facts as set forth in the agreed statement, and upon which said finding is based, do not constitute a public offense.

GARVER AND BOND,
Attorneys for Defendant.

The bill of exceptions signed and filed on the 26th day of Dec., 1881, is in words and figures as follows:

Bill of Exceptions.

In the District Court of Saline County, Kansas.

STATE OF KANSAS, Plaintiff,
vs.
PETER MUGLER, Defendant. } No. 289.

Be it remembered that upon the trial of this action the same was submitted to the court upon an agreed statement of facts, no other evidence being offered or introduced, said agreed statement of facts being in words and figures as follows:

STATE OF KANSAS, *Saline County,* } *ss:*

In District Court.

STATE OF KANSAS, Plaintiff,
vs.
PETER MUGLER, Defendant. } No. 289.

It is hereby stipulated and agreed that the facts in the above-

entitled case are, and that the evidence would prove them to be, as follows:

That the defendant, Peter Mugler, has been a resident of the State of Kansas continually since the year 1872; that, being foreign born, he in that year declared his intention to become a citizen of the United States, and always since that time intending to become such citizen, he did, in the month of June, 1881, by the judgment of the district court of Wyandotte county, Kansas, become a full citizen of the United States and of the State of Kansas.

That in the year 1877 said defendant erected and furnished a brewery on lots Numbers 152 and 154 on Third street, in the city of Salina, Saline county, Kansas, for use in the manufacture of an intoxicating malt liquor commonly known as beer.

That such building was specially constructed and adapted for the manufacture of such malt liquor, at an actual cost and expense to said defendant of ten thousand dollars, and was used by him for the purposes for which it was designed and intended after its completion in 1877 and up to May 1st, 1881. That said brewery was at all times after its completion and on May 1, 1881, worth the sum of ten thousand dollars for use in the manufacture of said beer, and is not worth to exceed the sum of twenty-five hundred dollars for any other purpose. That said defendant, since October 1, 1881, has used said brewery in the manner and for the purpose for which it was constructed and adapted by the manufacturing therein of such intoxicating malt liquors, and at the time of such manufacture of said malt liquors said defendant had no permit to manufacture the same for medical, scientific, or mechanical purposes, as provided by chapter 128 of Laws of 1881.

And the foregoing was all the evidence introduced in this case and upon which a finding of guilty was made.

And now on this 26th day of December, A. D. 1881, being the same term of court at which this case was tried, said defendant presented his bill of exceptions, and the same is settled and signed as a true and correct bill of exceptions herein, and it is ordered that it be filed as a part of the record of this case.

JOHN H. PRESCOTT, *Judge.*

STATE OF KANSAS, } ss:
Saline County, }

I, Joseph Moore, clerk of the district court of Saline county,
12 Kansas, do hereby certify that the above and foregoing are full, true, and correct copies, respectively, of the indictment, motion to quash, journal entry of the ruling of the court thereon, plea, journal entry of trial and judgment, motion for a new trial, motion in arrest of judgment, and bill of exceptions, and that the foregoing is a full and complete copy of all that pertains to the record in said case (except the warrant and subpœnaes), and is a full transcript of the record of the proceedings had therein.

I further certify that the notices hereto attached are the notices of appeal herein served by said defendant on me and on the county attorney of my said county on the 5th day of May, A. D. 1882.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, this 5th day of May, A. D. 1882.

[SEAL.] JOSEPH MOORE,
Clerk District Court.

13 And also, on, to wit, the thirty-first day of May, A. D. 1882, there was filed in the office of the clerk of the supreme court of the State of Kansas notice of appeal from the district court of Saline county, Kansas, to the supreme court of the State of Kansas, in the above cause, which is in words and figures as follows, to wit:

14 STATE OF KANSAS, } ss:
Saline County, }

In the District Court of said County.

STATE OF KANSAS, Plaintiff, }
vs. } No. 290. [289.]
PETER MUGLER, Defendant. }

To Joseph Moore, clerk of the district court, and H. S. Cunningham, county attorney of Saline County, Kansas:

You and each of you are hereby notified that the above-named defendant, Peter Mugler, appeals from the judgment entered in the above-entitled case, for the purpose of having the same reviewed in the Supreme Court.

GARVER AND BOND,
Att'ys for Peter Mugler.

We acknowledge service of above notice, this 5th day of May, A. D. 1882.

JOSEPH MOORE, *Clerk D. C.*
H. S. CUNNINGHAM,
County Attorney, Saline Co., Ks.

Filed May 31, 1882. C. J. BROWN,
Clerk Supreme Court.

15 And afterwards, on, to wit, the eighth day of November, A. D. 1882, the same being one of the regular judicial days of the July term, A. D. 1882, of the supreme court of the State of Kansas, before said court in session at the supreme court-room in the city of Topeka—present, Honorable Albert H. Horton, chief justice, Honorable Daniel M. Valentine and Honorable David J. Brewer, associate justices, and C. J. Brown, clerk of said court—the following proceeding, among others, was had and entered of record on page two hundred and eighty-nine of journal "I," as follows, to wit:

THE STATE OF KANSAS, Appellee, *vs.* PETER MUGLER, Appellant.

This cause came on to be heard on notices of appeal and transcript of the record of the district court of Saline county, and was submitted on brief of counsel for appellant, and taken under advise-

ment by the court. Counsel for appellee was allowed twenty days to file brief.

16 And afterwards, on, to wit, the fourth day of January, A. D. 1883, the same being one of the regular judicial days of the January term, A. D. 1883, of the supreme court of the State of Kansas, before said court in session at the supreme court-room in the city of Topeka—present, Honorable Albert H. Horton, chief justice, Honorable Daniel M. Valentine and Honorable David J. Brewer, associate justices, and C. J. Brown, clerk of said court—the following proceeding, among others, was had, and entered of record on page three hundred and sixty-seven of journal "I," as follows, to wit:

THE STATE OF KANSAS, Appellee, *vs.* PETER MUGLER, Appellant.

This cause came on for decision; and thereupon it is ordered and adjudged that the judgment of the court below be affirmed, with costs, and hereof let execution issue.

Valentine, J., delivered the opinion of the court. Horton, C. J., concurring. Brewer, J., concurring specially.

17 And also, on, to wit, the fourth day of January, A. D. 1883, the same being one of the regular judicial days of the January term, A. D. 1883, of the supreme court of the State of Kansas, there was filed in the office of the clerk of the said court the syllabus and opinion of the court in said cause, a copy of which is hereunto annexed and which are in words and figures as follows, to wit:

18 *Syllabus.*

THE STATE OF KANSAS *vs.* PETER MUGLER.

Appeal from Saline county. Affirmed.

By the court, VALENTINE, J.:

In 1877 the defendant erected a brewery, and has since operated the same in manufacturing beer, an intoxicating liquor. In 1881, after the taking effect of both the constitutional amendment relating to intoxicating liquors and the present prohibitory liquor act—Laws of 1881, chap. 128—the defendant manufactured beer, and also sold beer, without having any permit giving him authority to do either. The sale, however, was of beer which he had manufactured prior to the taking effect of the said prohibition act. Held, that the said prohibition act is not unconstitutional; but that it is constitutional and valid so far as it affects the defendant, and that the defendant committed a public offense both in the manufacturing of the beer, which he manufactured after the taking effect of the prohibition act, and in the sale of the beer, which he sold after the taking effect of such act.

Horton, C. J., concurring. Brewer, J., concurring specially.

A true copy.

[SEAL.] Attest: C. J. BROWN,
Clerk Supreme Court.

19 THE STATE OF KANSAS
vs.
PETER MUGLER. } No. 2622.

Two cases.

THE STATE OF KANSAS
vs.
PETER MUGLER. } No. 2623.

The opinion of the court was delivered by VALENTINE, J.

The defendant, Peter Mugler, was prosecuted criminally, in two different cases, for violations of the prohibitory liquor law. In the first case the indictment contained but one count, charging that the defendant "did unlawfully manufacture, and aid, assist, and abet in the manufacture," of certain intoxicating liquors. In the second case the indictment contained six counts; in the first five of which it charged that the defendant, on five different days, sold intoxicating liquors in violation of law; and in the sixth count it charged that the defendant was guilty of keeping and maintaining a common nuisance, by keeping for sale, and selling, certain intoxicating liquors. In the first case a motion was made by the defendant to quash the indictment, for the reason that it did not state facts sufficient to constitute any offense, and because it contained a double charge against the defendant. This motion was overruled by the court. A trial was then had in the case, before the court without a jury, upon an agreed statement of facts, which admitted that the defendant, since October 1, 1881, without a permit, manufactured beer, an intoxicating liquor, in a brewery erected by him in Salina, Kansas, in 1877, and used thereafter by him as a brewery up to May 1, 1881, the time when the present prohibitory liquor law went into effect; "that said brewery was at all times after its completion, and on May 1, 1881, worth the sum of $10,000 for use in the manufacture of said beer, and is not worth to exceed the sum of $2,500 for any other purpose." It was also admitted that the defendant used his brewery for the manufacture of beer after October 1, 1881, the same as he had done prior to May 1, 1881. In the second case motions to quash the indictment and to compel the prosecution to elect upon which count it would proceed were made by the defendant and were overruled by the court. A trial was then had in the second case, before the court without a jury, upon an agreed statement of facts, which admitted that the sale charged in the first count of the indictment was made by the defendant without a permit, and that it was a sale of beer manufactured by the defendant before the passage of the prohibitory act of 1881; but whether the beer thus sold was manufactured before the adoption of the constitutional amendment, in November, 1880, prohibiting the manufacture and sale of intoxicating liquors, except for medical, scientific, and mechanical purposes, the record is silent; and for what purpose the beer was sold the record is also silent. In each of these two cases the defendant was found guilty and fined $100, and in each he now appeals to this court.

The principal question supposed to be involved in these two cases

is as follows: Is, or is not, the present prohibitory liquor law constitutional, so far as it affects the defendant and his business in manufacturing beer at his brewery and selling the same? The defendant claims that such law is unconstitutional, and his counsel make a very able and elaborate argument in this court to show that it is unconstitutional. Among other things they say:

"Years prior to the enactment of the law, and even before the prohibition amendment to the constitution was discussed, the defendant erected his brewery and furnished it with the means necessary for the manufacture of beer, the subject of the charge in the indictment. When the amendment was adopted, and when the act for its enforcement became a law, the defendant's money was thus invested, and his brewery was his 'property.' The effect of the act is to close the doors of his business and leave what had been valuable property, recognized and protected by the law, lifeless, unremunerative, and almost worthless, as it idly rests under the condemnation of the new departure. By a simply legislative edict the defendant is stripped of $7,500 in value of property as effectually as if consumed by fire.

"In this he is deprived of property without due process of law, in violation of fundamental principles of government, and of the fourteenth article of amendment to the Constitution of the United States, which provides: 'Nor shall any State deprive any person of life, liberty, or property without due process of law.'

* * * * * * *

"The defendant is deprived of his property by mere force of the Legislative decree. No rule is established, or course prescribed, by which his rights are in any way to be considered. The Legislature finds him in the enjoyment of property which public policy in this State has never even subjected to any police regulation, nor placed in any way under the surveillance of the law. It simply says to him, This business which you have built up under the protection of the law, and which to this time has not been held to infringe upon public rights in any way, is henceforth condemned as a nuisance, and the value of your property confiscated for the public good. There is no notice, no hearing, no opportunity for redress; nothing is heard but this inexorable decree of annihilation, and the defendant sits in the midst of the ruins of that which years of toil had accumulated, under the vain hope that he had security under the law."

Much that counsel say we think has force. The Legislature has probably gone a long way in destroying the values of such kinds of property as the defendant owned, and has possibly gone to the utmost verge of constitutional authority. And yet we do not think that the result reached by counsel for the defendant necessarily follows from the facts and circumstances of this case. The defendant is certainly not deprived of his brewery, or of his liquor, or of any of his other tangible property. So far as the constitutional amendment and the prohibition act are concerned he still retains his brewery and his liquors, and all his other tangible property, just the same as he did prior to the passage or adoption of any of the present restrictive or

prohibitory liquor laws. But probably it is not his tangible property which he claims has thus been taken, or destroyed, or confiscated. It is his intangible property, his vested rights, founded upon or incidental to the rightful enjoyment or use of his visible and tangible property of which he claims to have been deprived. This brings us to a comparison between the former restrictive and prohibitory liquor laws of this State and the present restrictive and prohibitory liquor laws. In 1877, when the defendant erected his brewery, he had a right to manufacture all the beer or other intoxicating liquors which he chose, and he can do so still, provided he first obtains a permit therefor from the probate judge, and he can easily obtain the permit by complying with the terms and conditions upon which permits are issued. At that time he could manufacture intoxicating liquors for any purpose which he chose; but since the adoption of the constitutional amendment, in November, 1880, he can manufacture such liquors only for medical, scientific, and mechanical purposes. His right to sell intoxicating liquors, however, was always restricted. In 1877, under the then existing laws, he had no right to sell his beer or any other intoxicating liquor in any quantity
21 or in any place in Kansas, or to any person, unless he had first obtained a license therefor. The State *v.* Volmer, 6 Kas., 371; Dolson *v.* Hope, 7 Kas., 161; Alexander *v.* O'Donnell, 12 Kas., 608; and such is still the law. The license is now called a "permit," but even with a license the defendant had no right under the old laws to sell his beer on Sundays, or on election days, or on the Fourths of July, or to any person who was in the habit of becoming intoxicated, against the known wishes of his wife, child, parent, brother, or sister; or to any minor, against the consent of his parent or guardian; or at any place except the place designated in his license, which in the present case would have been the city of Salina. Besides, the defendant had no assurance, under the old laws, that he could procure a license. Licenses were not granted to anybody and everybody, but only to a select few, and then the license would continue in force for the period of one year only, and no person could have any assurance that his license would be renewed. Both the issuing and the renewal of licenses depended entirely upon the temper and disposition of the community in which the application was made. Under the old laws each community was given the privilege of determining for itself whether licenses to sell intoxicating liquors should be issued or not; and if none were issued, then the old law was as much a prohibition law as the present liquor law. The old law might properly be called not only a license law, but also an option law, and a contingent prohibition law; for licenses were allowed to be issued at the option of each community; and if they were not issued, the law would become a virtual prohibition law. Under the old law the entire State might have become a complete prohibition State at the option of its several communities, or each community might have authorized the issue of licenses as it chose. In this respect the old law and the present law differ. The old law left the question of prohibition or license with each community separately and exclusively, while the present law theoretically enforces prohibi-

tion upon all communities, whether they are willing or unwilling. We do not here wish to be understood as saying that our present liquor law, or any liquor law which we have ever had in Kansas, is, or has been, an absolute and unqualified prohibitory liquor law. They have none of them been more than limited and qualified prohibition laws. Under the old law the defendant, with a license, could sell his beer to any person and to all persons, with the exceptions heretofore mentioned; but under the present law we suppose he is subject to at least one other restriction in his sales as to persons. He cannot now sell his beer for medical purposes, except to druggists. It would seem, however, that with a permit he may now sell his beer for scientific and mechanical purposes to any and every person who might wish to purchase the same, and therefore it would seem that in this respect no additional restrictions over the old law are imposed. We think it will now appear that the old law and the new are not so vastly different, as has been by some person supposed. Both are restrictive in their character; both are criminal laws, and both are prohibitory to some extent, and yet neither is absolutely and unqualifiedly a prohibition statute. Both restrict sales as to times, places, and persons, and the present law as to purposes, and yet both laws allow sales to be made. Under the old law the defendant never had any authority to sell his beer, except with a license. He never had any positive assurance that a license would be granted to him, or, if granted, that it would be extended or renewed; and even with a license he could not sell his beer at any other place than at the city of Salina. And this right to sell beer for any considerable period of time was always based upon many uncertainties and contingencies. Under the present law
22 the defendant, with a permit, which he can easily obtain, can manufacture all the beer for medical, scientific, and mechanical purposes, which he chooses to manufacture, and can sell the same for such purposes, provided he can find purchasers therefor. The material restrictions imposed by the present law, in addition to those imposed by the old law, are simply as to the purposes for which he may sell, and as to the persons to whom he may sell, for medical purposes. There are no other material or substantial restrictions.

Under such circumstances we hardly think that the defendant had such a vested interest in the law, or in anything else, as would prevent the passage of a law like our present prohibition act. It would hardly seem that the defendant, by erecting a brewery in 1877, and by operating it for some time afterward, could obtain such a vested interest in anything as to prevent further legislation with respect to intoxicating liquors of a more restrictive and stringent character, or that he could go on, with or without legislation, and with or without a license, manufacturing and selling beer forever. We suppose that the defendant founds his right to continue to manufacture and sell beer solely and exclusively upon his supposed vested right to operate his brewery in undisturbed tranquility forever. He certainly will not claim that, independent of his brewery, he had a vested right, at the time the constitutional amendment was adopted, or at the time the present prohibition law was enacted, to

either manufacture or sell any kind of intoxicating liquor which had not yet been brought into existence. His whole claim we suppose springs from the rights which his brewery is supposed to have conferred upon him, but these rights we think cannot have such far-reaching consequences as the defendant claims. The beer which the defendant is prosecuted for manufacturing was not in existence at the time when the constitutional amendment was adopted, or at the time when the prohibition act went into operation, but it was manufactured since, and hence, independent of the defendant's interest in his brewery, he could not have had any possible vested right, at the time of the adoption and passage of the present prohibition laws, in the manufacture of such beer. Nearly the same may be said with respect to the beer which the defendant is prosecuted for selling. Presumably, it was not in existence at the time when the constitutional amendment was adopted. Besides, the sale of such kinds of liquor, when made as this sale was made, would have been a violation of the laws of Kansas, and a criminal offense, at any time for the last twenty-three years. In this respect the present law is not new. The sale in the prescnt case was made without a permit or a license. It may be that the defendant has suffered great loss on account of the passage of the prohibition act, but such loss is not the direct and immediate result of such act; it is simply the remote and consequential result of the act, and is wholly speculative and problematical. Such indirect and remote losses cannot render acts of the Legislature unconstitutional. The Beer Co. *v.* Massachusetts, 97 U. S., 25; Bartemeyer *v.* Iowa, 85 U. S., (18 Wall.) 129.

It is frequently the case that the passage of statutes indirectly affect the values of property, as this act does, and still we do not think that such statutes are ever declared to be unconstitutional merely for such reasons. We think that the present prohibition act of Kansas is constitutional, so far as it affects the defendant, and so far as it has any application to the two cases now under consideration. We do not think that the court below committed any error in either of these two cases; but even if it did with respect to the motions of the defendant, which it overruled, the errors were wholly immaterial. In the first case, the defendant was tried upon an
23 agreed statement of facts simply for manufacturing intoxicating liquors contrary to law. In the second case, he was tried upon an agreed statement of facts, upon the first count only of the indictment, and merely for selling intoxicating liquor contrary to law, and for one sale only; and in both cases we think the judgment of the court below was correct, and it will therefore be affirmed.

Horton, C. J., concurring.

BREWER, J.:

I concur fully in the foregoing opinion, so far as it relates to the charge of selling beer, and I think the reasoning of my Brother Valentine thereon is unanswerable. But as to the case in which the charge is of manufacturing beer, and without regard to the purpose for which it was manufactured, while I do not care to formally

dissent, I must say that my judgment is not satisfied. The defendant may have manufactured the beer for his own consumption; it certainly is not shown or alleged that he did not, and in a criminal proceeding it is not to be presumed that defendant has done wrong; and I have yet to be convinced that the Legislature has the power to prescribe what a citizen shall eat or drink, or what medicines he shall take, or prevent him from growing or manufacturing that which his judgment approves for his own use as food, drink, or medicine.

Further, prior to the constitutional amendment the manufacture of beer was free and unrestricted; no license, permit, or condition was required. Under that state of the law this defendant invested his means in building and machinery, suitable for the purpose of manufacturing beer, and unsuitable for any other purpose, worth $10,000 for the former use and not to exceed $2,500 otherwise. The denial of the use has thus practically deprived him of $7,500. Is not this taking private property for public use without any compensation? If the public good requires the destruction of the value of this property, is not prior compensation indispensable?

A true copy.

[SEAL.] Attest: C. J. BROWN,
Clerk Supreme Court.

24 THE STATE OF KANSAS, } ss:
Supreme Court, }

I, C. J. Brown, clerk of the supreme court of the State of Kansas, do hereby certify that the above and foregoing is a true and complete copy of the pleadings, of the record of proceedings had, of the judgment rendered, of the syllabus and opinion filed in the above-entitled cause, together with the original petition for the writ of error, the writ of error, the citation and acknowledgment of service thereon, and appeal bond, as the same remain of record and on file in my office.

In witness whereof, I have hereunto subscribed my name and affixed the seal of the supreme court of the State of Kansas, at my office, in Topeka, Kansas, this eleventh day of April, A. D. 1883.

[SEAL.] C. J. BROWN,
Clerk of the Supreme Court of the State of Kansas.

Endorsed on cover: Kansas supreme court. No. 791. Peter Mugler, plaintiff in error, *vs.* The State of Kansas. Filed 16th November, 1883.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1886.

PETER MUGLER, PLAINTIFF IN ERROR,
vs.
THE STATE OF KANSAS, DEFENDANT IN ERROR. } No. 211.

ALSO

PETER MUGLER, PLAINTIFF IN ERROR,
vs.
THE STATE OF KANSAS, DEFENDANT IN ERROR. } No. 212.

IN ERROR TO THE SUPREME COURT OF KANSAS.

G. G. VEST,
For Plaintiff in Error.

JUDD & DETWEILER, Printers.

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IN ERROR TO THE SUPREME COURT OF KANSAS.

STATEMENT.

These cases involve the constitutionality of what is known as "The Prohibition Law" of the State of Kansas.

On November 2d, 1880, the people of Kansas adopted an amendment to the State constitution as follows:

"The manufacture and sale of intoxicating liquors shall be forever prohibited in this State, except for medical, scientific, and mechanical purposes."

In February, 1881, the Legislature enacted a prohibitory statute, the first section of which reads as follows:

"Any person or persons who shall manufacture, sell or barter any spirituous, malt, vinous, fermented, or other in-

toxicating liquors, shall be guilty of a misdemeanor, and punished as hereinafter provided.

"*Provided, however*, That such liquors may be sold for medical, scientific, and mechanical purposes, as provided in this act."

Section two of the act prohibits any sale or barter of intoxicating liquors for medical, scientific, or mechanical purposes, without a druggists' permit therefor, to be obtained from the probate judge of the county, and provides in what manner such permit may be obtained.

Section five reads as follows:

"No person shall manufacture or assist in the manufacture of intoxicating liquors in this State, except for medical, scientific and mechanical purposes." And the section then provides for the manner in which a permit to manufacture for the purposes specified shall be obtained.

Laws of Kansas, 1881, pages 233–7.

On November 29th, 1881, the plaintiff in error, Peter Mugler, was indicted in the District court of Saline county, Kansas, charged with violating the first section of the statute, by selling spirituous and intoxicating liquors without a license therefor.

The indictment contains six counts, in five of which the plaintiff in error was charged with such illegal sales on five different days, from November 10th to November 21st, 1881; and in the sixth count with maintaining and keeping a common nuisance, commonly known as "Mugler's brewery," used for the illegal bartering and selling of intoxicating liquors, &c.

The last count was framed under the provisions of section thirteen of the statute.

Laws of Kansas, 1881, page 241.

The plaintiff in error was also indicted in the District court of Saline county, Kansas, at its November term, 1881,

for unlawfully manufacturing intoxicating and spirituous liquors, in violation of section 8 of the prohibitory statute, which reads as follows:

"Any person, without taking out and having a permit to manufacture intoxicating liquors as provided in this act, who shall manufacture, or aid, assist or abet in the manufacture of any of the liquors mentioned in section one of this act, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall suffer the same punishment as provided in the last preceding section of this act for unlawfully selling such liquors."

After motions to quash, and to cause the State to elect upon which count in the first indictment it would proceed to trial, both of which motions were overruled, the plaintiff in error, on December 19th, 1881, filed a plea to this indictment, as follows:

"That in the year 1877, he erected and furnished a brewery on the lots described in said indictment, in the city of Salina, Saline county, Kansas, at an actual outlay and expense of $10,000, and that he has been since that time and now is, the owner thereof. That said property was specially constructed and adapted for use as a brewery, and, being so specially constructed and adapted, the same is nearly valueless for any other purpose, and that while said brewery is worth the sum of ten thousand dollars, ($10,000) for the purposes for which it was constructed, it is worth not to exceed three thousand dollars ($3,000) for any other purpose. Said defendant further alleges that whatever liquors were sold or given away by him, as charged in said indictment, were liquors manufactured at and in due course of the business of said brewery, and were included and disposed of in the original packages. Wherefore the said defendant says that the act under which this prosecution is instituted, so far as it affects him in the use of such property for the purposes for which it was and is adapted, without compensation for any damage done thereto, is unconstitutional, null and void."

Plaintiff in error, also filed a motion to quash the second indictment for the illegal manufacture of intoxicating liquors, which was overruled, and on December 19th, 1881, filed his plea to said indictment, which is identical with his former plea to the indictment for unlawful selling, except the allegation that "whatever liquors were manufactured by him, as charged in said indictment, were manufactured at and in the due course of the business of said brewery, and for the purpose of enjoying the use and benefit of such property."

On January the 4th, 1882, plaintiff in error, was tried upon each of said indictments, the facts in the first case for unlawful selling being agreed by written stipulation to be as follows:

"That in the year 1877, said defendant erected and furnished a brewery on lots Nos. 152 and 154, on Third street, in the city of Selina, Saline county, Kansas, for use in the manufacture of an intoxicating malt liquor, commonly known as beer; that such building was specially constructed and adapted for the manufacture of such malt liquor, at an actual cost and expense to said defendant of ten thousand dollars ($10,000), and was used by him for the purpose for which it was designed and intended after its completion in 1877, and up to May 1st, 1881.

"That of the beer so manufactured and on hand prior to February 19th, 1881, said defendant made one sale since May 1st, 1881, which is the sale charged in the first count of the indictment, said sale being made on the above-described premises; that the beer so sold was in the original packages in which it was placed after its manufacture, and was not sold for use, nor used on said premises, and that at the time of such sale said defendant had no permit to sell intoxicating liquors, as provided by Chapter 128 of Laws of 1881."

An agreed statement of facts was also filed in the second case, as follows:

"That in the year 1877 said defendant erected and furnished a brewery on lots Nos. 152 and 154 on Third street,

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1886.

No. 211.

PETER MUGLER, PLAINTIFF IN ERROR,

vs.

THE STATE OF KANSAS, DEFENDANT IN ERROR.

ASSIGNMENT OF ERROR.

Plaintiff in error assigns the following for error in the action of the supreme court of Kansas:

First. Said court erred in affirming the judgment of the district court of Saline county, Kansas, that the defendant, Mugler, pay a fine of one hundred dollars for the alleged violation of a statute of said State, prohibiting the sale or barter of spirituous or malt liquors, except for medical, scientific, and mechanical purposes; said statute being in violation of Article 14 of the Constitution of the United States, which provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

Second. Said court erred in affirming the judgment of the district court of Saline county, Kansas, overruling the motions of defendant, Muglar, for a new trial, and in arrest of judgment, which motions should have been sustained.

G. G. VEST,
For Plaintiff in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1886.

No. 212.

PETER MUGLER, PLAINTIFF IN ERROR,

vs.

THE STATE OF KANSAS, DEFENDANT IN ERROR.

Plaintiff in error assigns the following for error in the action of the supreme court of Kansas:

First. Said court erred in affirming the judgment of the district court of Saline county, Kansas, that defendant, Mugler, pay a fine of one hundred dollars for the alleged violation of a statute of Kansas, prohibiting the manufacture of spirituous or malt liquors by any person without having a permit to manufacture such liquors for medical, scientific, and mechanical purposes; said statute being in violation of Article 14 of the Constitution of the United States, which provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive

any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

Second. Said court erred in affirming the judgment of the district court of Saline county, Kansas, overruling the motion of defendant, Mugler, for a new trial and in arrest of judgment, which motion should have been sustained, the statute under which said defendant was convicted being unconstitutional in that it attempts to deprive said defendant of the right to manufacture beer even for his own use, or for storage or transportation out of the State of Kansas, and also deprives defendant of his right to use his property for the manufacture of beer, without due process of law.

G. G. VEST,
For Plaintiff in Error.

in the city of Salina, Saline county, Kansas, for use in the manufacture of an intoxicating malt liquor, commonly known as beer.

"That such building was specially constructed and adapted for the manufacture of such malt liquor, at an actual cost and expense to said defendant of ten thousand dollars, and was used by him for the purposes for which it was designed and intended after its completion in 1877, and up to May 1st, 1881.

"That said brewery was at all times after its completion, and on May 1st, 1881, worth the sum of ten thousand dollars for use in the manufacture of said beer, and is not worth to exceed the sum of twenty-five hundred dollars for any other purpose.

"That said defendant, since October 1st, 1881, has used said brewery in the manner and for the purpose for which it was constructed and adapted, by the manufacturing therein of such intoxicating malt liquors, and at the same time of such manufacture of said malt liquors, said defendant had no permit to manufacture the same for medical, scientific, or mechanical purposes, as provided by Chapter 128 of Laws of 1881."

Upon these agreed statements of facts the plaintiff in error was adjudged to be guilty by the district court, and sentenced to pay a fine of one hundred dollars in each case; and after unsuccessful motions for new trials and in arrest of judgment, the cases were appealed to the supreme court of Kansas, where the judgments were affirmed.

From these judgments of affirmance, writs of error were sued out to this Court under the provisions of the judiciary act of 1789, (Rev. Statutes, Sec. 709).

POINTS AND AUTHORITIES.

First. The law of Kansas prohibiting the manufacture of "any spirituous, malt, vinous, fermented, or other intoxicating liquors," except for "medical, scientific, and mechanical purposes," is in conflict with Article 14 of the Constitution, which declares that "no State shall make or enforce any

law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The defendant was indicted for manufacturing beer, without having a license to manufacture for "medical, scientific, and mechanical purposes." There was no allegation in the indictment, and no proof or attempt to prove, that the beer was manufactured for sale or barter.

The naked proposition contained in the Kansas constitution and statute, is, that no citizen shall manufacture even for his own use, or for exportation, any intoxicating liquors.

The State has unquestionably the power to prohibit the manufacture, for sale or barter, of intoxicating liquors within its limits; it has the power to prohibit the manufacture of explosive substances, such as dynamite or nitro-glycerine, which from their nature are dangerous to the lives or property of others, but no convention or legislature has the right, under our form of Government, to prohibit any citizen from manufacturing for his own use, or for export, or storage, any article of food or drink not endangering or affecting the rights of others.

In the implied compact between the State and citizen, certain rights are reserved by the latter, with which the State cannot interfere. These rights are guaranteed by the Federal and State Constitutions in the provisions of those instruments which protect "life, liberty, and property."

The doctrines of the Commune give to the State the right to control the tastes, appetites, and habits of the citizen; his dress, food, drink, domestic relations are controlled and regulated by the State. "The State is everything, the individual nothing." In order to make him a useful citizen and tax-payer, the State exercises a surveillance over all that he is and has.

On the other hand, our system of Government, based upon

the individuality and intelligence of the people, does not claim to control the citizen except as to his conduct to others, leaving him the sole judge as to all that only affects himself.

"As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it, becomes open to discussion. But there is no room for entertaining any such question when a person's conduct affects the interests of no persons besides himself, or needs not affect them unless they like (all the persons concerned being of full age and the ordinary amount of understanding). In all such cases there should be perfect freedom, legal and social, to do the action and stand the consequences."

"Neither one person nor any number of persons is warranted in saying to another human creature of ripe years that he shall not do with his life, for his own benefit, what he chooses to do with it. He is the person most interested in his own well being; the interest which any other person, except in cases of strong personal attachment, can have in it is trifling compared with that which he himself has; the interest which society has in him individually (except as to his conduct to others) is fractional and altogether indirect, while, with respect to his own feelings and circumstances, the most ordinary man or woman has means of knowledge immeasurably surpassing those that can be possessed by any one else."

John Stuart Mill on "Liberty," 145–6.

"The absolute (or natural) rights of individuals may be resolved into the right of personal security, the right of personal liberty, and the right to acquire and enjoy property."

Kent's Commentaries, Vol. 2, p. 1.

The right to manufacture for his own use either food or drink is certainly an absolute or natural right reserved to every citizen. It is a right guaranteed by the Fourteenth Amendment, and when the legislature of Kansas punishes the plaintiff in error for simply manufacturing beer, it

"abridges his privileges as a citizen of the United States," "deprives him of both liberty and property without due process of law," and denies him "the equal protection of the laws."

"By the absolute *rights* of individuals we mean those which are so in their primary and strictest sense—such as would belong to thier persons merely in a state of nature, and which every one is entitled to enjoy, whether *out of society or in it.*

"But with regard to absolute *duties*, which man is bound to perform considered as a mere individual, it is not to be expected that any human municipal law should at all explain or enforce them. For the end and intent of such laws being only to regulate the behavior of mankind, as they are members of society, and stand in various relations to each other, they have consequently no concern with any other but social or relative duties. Let a man be ever so abandoned in his principles or vicious in his practice, provided he keeps his wickedness to himself, and does not offend against the rules of public decency, he is out of the reach of human laws."

"For the principal aim of society is to protect individuals in the enjoyment of those absolute rights which were vested in them by the immutable laws of nature; but which could not be preserved in peace without that mutual assistance and intercourse which is gained by the institution of friendly and social communities."

Cooley's Blackstone, vol. 1, pp. 122–3.

In Munn vs. People of Illinois, 4 Otto, 83–4, Chief Justice Waite says:

"When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relation to others, he might retain." "A body politic," as aptly defined in the preamble of the Constitution of Massachusetts, "is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the public good."

"This does not confer power upon the whole people to control rights which are purely and exclusively private."
Citing, Thorpe *vs.* R. R. Co., 27 Vt., p. 143.

Civil liberty is defined by Blackstone to be "that of a member of society, and is no other than *natural liberty* so far restrained by human laws (and no further) as is necessary and expedient for the general advantage of the public."

If the Constitution and Prohibitory Statute of Kansas leave any residuum of *natural liberty* remaining anywhere, it will require microscopical inquiry to find it. If a State convention or legislature can punish a citizen for manufacturing beer, or wine, or bread, not to be sold or bartered or even given away, but for his own use, then instead of civil liberty, we are living under the most unlimited and brutal despotism known in history.

If a convention or legislature can enter into every man's house, and prescribe what he shall or shall not manufacture, ignoring entirely the question of whether he proposes to dispose of the article manufactured to others, or whether its manufacture is dangerous in the process of manufacturing to the lives or property of others, then it follows logically that the same power can prescribe the tastes, habits, and expenditure of every citizen.

In the Slaughter-House Cases, Justice Miller, in delivering the majority opinion, quotes approvingly Chancellor Kent's definition of the police power of the States:

"Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may all," says Chancellor Kent, 2 Comm., 340, "be interdicted by law in the midst of dense masses of population on the general and rational principle that every person ought so to use his property as not to injure his neighbors, and that private interests must be made subservient to the general interests of the community."

"This," said Justice Miller, "is called the police power; and it is declared by Chief Justice Shaw that it is much easier to perceive and realize the existence and sources of it than to mark its boundaries, or prescribe limits to its exercise." See opinions of Justices Bradley and Field in Butchers' Union, etc., Co., vs. Crescent City, etc., Co., 111 U. S., 588.
Com. vs. Alger, 7 Cush., 84.

Broad and comprehensive as is this power it certainly cannot extend to the individual tastes and habits of the citizen, which are confined entirely to himself and have no effect upon others.
License Cases, 5 Howard, 583.

Whatever may be the injurious results from the intemperate use of beer, or whatever the differences of opinion as to its sanitary qualities, it will certainly not be contended that there is anything in the process of manufacturing it, which endangers the lives or property of others.
Corfield vs. Coryell, 4 Wash., C. C., 371.

The constitution and statute of Kansas can only be defended on the ground that the State can take possession of the persons and property of its citizens absolutely, and so regulate and reform them as to produce the ideal father, husband, and tax-payer of the Commune.

"In former times sumptuary laws were sometimes passed and they were even deemed essential in republics to restrain the luxury so fatal to that species of government. But the ideas which suggested such laws are now exploded utterly, and no one would seriously attempt to justify them in the present age.
"The right of every man to do what he will with his own, not interfering with the reciprocal rights of others, is accepted among the fundamentals of our law."
Cooley's Constitutional Limitations, 385.

Whatever difference of opinion may exist as to the scope and effect of the first clause of the 14th article of the Constitution, which declares that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," there can surely be no reasonable doubt that both "citizens of the United States," and "citizens of the States" have the natural right to manufacture beer for individual use.

In the majority opinion delivered in the Slaughter-House Cases, Justice Miller, commenting upon this clause of the 14th article, says:

"Having shown that the privileges and immunities relied on in the argument are those which belong to citizens of the States as such, and that they are left to the State governments for security and protection, and not by this article placed under the special care of the Federal Government, we may hold ourselves excused from defining the privileges and immunities of citizens of United States which no State can abridge, until some case involving those privileges may make it necessary to do so. But lest it should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture to suggest some which owe their existence to the Federal Government, its national character, its Constitution, or its laws."

The privileges and immunities belonging to citizens of the United States as such, are then specifically set forth, the enumeration concluding with these words, "To these may be added the right secured by the Thirteenth and Fifteenth articles of Amendment, and by the other clause of the Fourteenth, next to be considered."

The clause referred to is as follows:

"Nor shall any State deprive any person of life, liberty, or property without due process of law."

This is one of the privileges or immunities of citizens of the United States as such.

Without entering into the questions so fully discussed in the Slaugher-House Cases as to the proper construction of the first clause of the Fourteenth Article of Amendment, the plaintiff in error confidently submits his case upon the contention that the prohibition statute of Kansas deprives him of "liberty and property without due process of law."

If we are right in the assumption that the citizen stands before the law in a dual character, both as an individual and a member of society; that in the former status he has certain natural rights not surrendered to society, but reserved to himself and necessary to his pursuit of happiness, and which the law cannot take away; that his right to manufacture any article of food or drink or apparel, provided the process of manufacturing does not endanger the lives or property of others, is one of these reserved or natural rights, then the statute of Kansas now in question is not "due process of law."

"Due process of law in each particular case means such an exertion of the power of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."

Cooley's Constitutional Limitations, 356.
Wynehamer *vs.* People, 13 New York, 432.
State *vs.* Allen, 2 McCord, 56.
Sears *vs.* Cottrell, 5 Mich., 251.
Taylor *vs.* Porter, 4 Hill, 140.
Hoke *vs.* Henderson, 4 Dev., 15.
James *vs.* Reynolds, 2 Texas, 251.
Kennard *vs.* Louisiana, 92 U. S., 478.

"The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which

might be devised. The article is a restraint on the executive and judicial powers of the Government and cannot be so construed as to leave Congress to make any process, due process of law."

Murray's Lessee *vs.* Hoboken Land and Improvement Co., 18 How., 276.

In the Dartmouth College Case, Mr. Webster defined the "law of the land," or "due process of law," to mean "the general law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities, under the protection of general laws which govern society. Everything which may pass under the form of an enactment is not the 'law of the land.'" See also:

Brown *vs.* Hummel, 6 Barr.

Norman *vs.* Heist, 5 W. & S., 195.

"The general laws governing society" guarantee to the citizen his right to manufacture beer, and until he attempts to sell or barter he cannot be punished.

In this case the State of Kansas, by a legislative enactment, deprives the citizen of a right existing in all free governments, and only denied in unlimited despotisms. This cannot be "due process of law."

If it be said that the citizen is indicted, arrested, and tried by jury, before conviction, and that this constitutes "due process of law," our reply is that this is the mere machinery to enforce an unconstitutional statute. The mandate of the Legislature is imperative, and robs the citizen of a privilege which, in a free government, cannot be denied. No discretion is given the courts, but the constitution of Kansas, and the statute made to furnish the means for enforcing it are absolute and mandatory.

They declare that "the manufacture of intoxicating liquors

shall be forever prohibited in the State, except for medical, scientific, and mechanical purposes."

Under the humane and just laws which obtain in all free governments, every reasonable intendment is made in favor of the accused, and the burthen of proving his guilt rests upon the State.

If all that is charged in the indictment be granted, what offense has been committed under the laws of any free people?

For all that appears in the case the plaintiff in error manufactured the beer for his own use, or to be exported, or for storage. There is no evidence that he intended to sell or barter, or give it to any citizen of Kansas.

What right then or power existed in the authorities of that State to inflict punishment?

"Under the power to regulate the State cannot deprive the citizen of the lawful use of his property if it does not injuriously affect or endanger others. We are unwilling to concede the existence of an indefinable power, superior to the Constitution, that may be invoked whenever the legislature may deem the public exigency may require it, by which a party may be capriciously deprived of his property or its use without compensation, whether such property consists of franchises or tangible forms of property."

Lake View *vs.* Rose Hill Cem. Co., 70 Ills., 191.

"It is not within the power of the General Assembly under the pretence of exercising the police power of the State, to enact laws not necessary to the preservation of the health and safety of the community; that will be oppressive and burdensome to the citizen. If it should prohibit that which is harmless in itself, or command that to be done which does not tend to promote the health, safety, or welfare of society, it would be an unauthorized exercise of power, and it would be the duty of the courts to declare such legislation void."

T., W. & W. R. W. Co. *vs.* City of Jacksonville, 67 Ills., 37–40.

Tenement House Cigar Cases.
98. N.Y. 98.
People vs Marx. 99 N.Y. 377

In the Intoxicating Liquor Cases, 25 Kansas, 765, Judge Brewer said:

"I do not think the legislature can prohibit the sale or use of any article whose sale or use involves no danger to the general public. The habits, the occupation, the food, the drink, the life of the individual are matters of his own choice and determination, and can be abridged or changed by the majority speaking through the legislature only when the public safety, the public health, or the public protection require it. * * * The constitutional guaranty of life, liberty, and the pursuit of happiness is not limited by the temporary caprice of a present majority, and can be limited only by the absolute necessities of the public."

There has never been, and can never be, any question more important or more vital to the existence of civil liberty than that involved in this case. It is the question of the Centuries, over and about which men have fought and suffered and died, until out of the dark and dreary struggle the great truth has been established that "the only freedom which deserves the name is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily or mental and spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves than by compelling each to live as seems good to the rest."

John Stuart Mill "On Liberty," 28–9.

In Calder and Wife *vs.* Bull, 3 Dallas, 386, Judge Chase said:

"I cannot subscribe to the omnipotence of a State legislature, or that it is absolute and without control, although the authority should not be restrained by the constitution or fundamental law of the State. The nature and end of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free republican government, that no man should be compelled to

do what the laws do not require, nor refrain from acts which the laws permit. There are acts which the Federal or State legislatures cannot do without exceeding their authority.

"There are certain vital principles in our free republican government which will determine and overrule an apparent and flagrant abuse of legislative power, as to authorize manifest injustice by a positive law, or to take away that security for personal liberty or private property for the protection whereof government was established."

See also Fletcher vs. Peck, 6 Cranch, 135.
Dash vs. Van Kleeck, 7 Johns, 477
Taylor vs. Porter, 4 Hill, 146 (per Bronson, J.)
Goshen vs. Stonington, 4 Conn., 225 (per Hosmer, J.)

The claim that any legislative body in this country can absolutely destroy private rights and personal liberty, as in this case, is a monstrous assumption, at war with the established and axiomatic principles of free government.

No protest is made by the plaintiff in error against the exercise of its constitutional discretion by the legislature. The courts are not asked to invade the legitimate province of the legislative department in its exercise of the police power. No claim of visionary and speculative natural rights outside of the written constitution is set up.

Our contention is simply that no legislature has, under our form of government, the power to prohibit the citizen from manufacturing beer, unless that manufacture be for sale or barter to others, and when the citizen is deprived of such right by a mere legislative enactment it is not "due process of law."

Second. The prohibition statute of Kansas deprives the plaintiff in error, directly and absolutely, of his property, without "due process of law." His brewery was built in 1877, for the purpose of manufacturing beer to be used as a beverage, a legitimate industry, then under the protection of law. By the statutory enactment of 1881 this property, worth $10,000 for the purpose to which it was adapted, is reduced to $2,500 in

value, not indirectly or consequentially, but by direct prohibition of the real and primary use of the property.

This question has never been directly adjudicated by this Court.

In Bartemeyer *vs.* Iowa, 18 Wall., 930, an attempt was made to secure a ruling upon a similar case, but the Court declined to consider the question. Justice Miller, delivering the opinion, said:

"But if it were true, and it was fairly presented to us, that the defendant was the owner of the glass of intoxicating liquor which he sold to Hickey at the time that the State of Iowa first imposed an absolute prohibition on the sale of such liquors, then we concede that two very grave questions would arise, namely: 1. Whether this would be a statute depriving him of his property without due process of law; and secondly, whether, if it were so, it would be so far a violation of the Fourteenth Amendment in that regard as would call for judicial action by this Court?"

It will be seen by reference to the statutes of Kansas that prior to the Constitutional amendment, and to May 1, 1881, when the prohibition law took effect, the plaintiff in error had the right to manufacture beer without any restriction as to the purpose for which it was to be sold or used.

After May 1, 1881, the statute prohibited the manufacture except for medical, scientific and mechanical purposes, and required the manufacturer to obtain a permit for the specified purposes.

It is admitted that the plaintiff in error had no such permit when he manufactured beer after May 1, 1881, and the question now presented is whether the legislature had the Constitutional power to take from him without compensation the use of his property except for certain limited and specified purposes.

The majority of the supreme court of Kansas seem to have been impressed with the idea that so long as the plaintiff in error was permitted to use his brewery for any purpose, no

matter how restricted, he was not deprived of his property.

This is a singular position.

Every fair and candid mind will admit that the ordinary, usual, and principal use of beer is as a beverage, and that its use for medical, scientific, or mechanical purposes is exceptional and rare.

In delivering the opinion in Wynhamer *vs.* The People, 13 Kern., 387, Comstock, J., said:

"We must be allowed to know what is known by all persons of common intelligence, that intoxicating liquors are produced for sale and consumption as a beverage; that such has been their primary and principal use in all ages and countries; and that it is this use which has imparted to them, in this State, more than ninety-nine hundredths of their commercial value. It must follow that any scheme of regulation which, aiming at the destruction of this use, makes the keeping or sale of them as a beverage, in any quantity, or by any person, a criminal offense, which declares them a public nuisance, which subjects them to seizure and physical destruction, and denies a legal remedy if they are taken by lawless force or robbery, must be deemed, in every beneficial sense, to deprive the owner of the enjoyment of his property."

As well might it be claimed, that a hotel-keeper, who has constructed a valuable building for the entertainment of the public, is not deprived of his property, or its use, when forbidden by the legislature to entertain any guest unless an invalid.

Such cavils are unworthy the importance of the question.

Every intelligent observer knows that the statute of Kansas was enacted simply and solely to destroy the use of beer as a beverage, and for its supporters to take refuge behind the pretext that there was any other purpose, is an unfair and unworthy subterfuge.

There is no pretense or claim that the legislature has not the right to prohibit the sale of beer, or its manufacture for sale or barter in the future, but that is very different from the question here presented, as to the power of the legislature

to destroy the value of vested rights by legislative enactment without compensation, and without "due process of law."

Not satisfied with legislating for the future, the Kansas legislature has attempted to destroy property rights already vested, and created under laws enacted by the same authority.

"That government," says Story, "can scarcely be deemed to be free where the rights of property are left wholly dependant upon the will of a legislative body without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred."

Wilkinson *vs.* Leland, 2 Pet., 657.

See also opinion of Justice Field in Munn *vs.* People of Illinois, 4 Otto, 113.

In Bartemeyer *vs.* Iowa, 13 Wall., 129, Justice Bradley, concurring in the judgment, said:

"The law therefore was not an invasion of property existing at the time of its passage, and the question of depriving a person of property without due process of law does not arise. No one has ever doubted that a legislature may prohibit the vending of articles deemed injurious to the safety of society, *provided it does not interfere with vested rights of property. When such rights stand in the way of the public good they can be removed by awarding compensation to the owner.*"

In the same case Justice Field said:

"I have no doubt of the power of the State to regulate the sale of intoxicating liquors, when such regulation does not amount to the destruction of the rights of property in them. The right of property in an article involves the power to sell and dispose of such article as well as to use and enjoy it. Any act which declares that the owner shall neither sell it nor dispose of it, nor use and enjoy it, confiscates it, depriving him of his property without due process of law. Against such arbitrary legislation by any State the Fourteenth Amendment affords protection."

"It would be unjust to the memory of the distinguished men who framed it to suppose that it was designed to protect a mere barren and abstract right, without any practical operation upon the business of life. * * * And it would ill become this Court, under any circumstances, to depart from the plain meaning of the words used and to sanction a distinction between the right and the remedy, which would render the provision illusive and nugatory—mere words of form, affording no protection and producing no practical result."

The question was effectually disposed of by this Court in Pumpelly vs. Green Bay Co., 13 Wall., 177. Speaking through Justice Miller, the Court said:

"It would be a very curious and unsatisfactory result if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the Government, and which has received the commendation of jurists, statesmen, and commentators, as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that, if the Government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, and can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of the word, it is not taken for the public use.

"Such a construction would pervert the constitutional provision into a restriction on the rights of the citizen as those rights stood at the common law, instead of the Government, and make it an authority for the invasion of private rights under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

The supreme court of Kansas, or a majority of the court, came to the conclusion that the damages to plaintiff in error were so consequential and remote that the case came within the class of cases described by Justice Strong in The Northern Transportation Co. vs. The City of Chicago, 99 U. S., 333. In his opinion, Justice Strong said:

"But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the State or its agents, or give him any right of action. This is supported by an immense weight of authority. Those who are curious to see the decisions will find them collected in Cooley on Constitutional Limitations, 542, and notes."

In the work of Judge Cooley the result of all the authority, *pro* and *con*, is stated by him, as follows:

"Any proper exercise of the powers of government which does not directly encroach upon the property of an individual, or disturb him in its possession or enjoyment, will not entitle him to compensation."

Cooley on Constitutional Limitations, 541.

There is no disposition to controvert this rule, and it is evident that it does not affect the case now before the Court.

The property of plaintiff was neither taken under a proper exercise of governmental power, or indirectly. The right of plaintiff to manufacture beer as a beverage, vested in him by existing law, is taken away directly and absolutely by legislative enactment. Whilst he is left in possession of his brewery he is forbidden to use it for the principal, and in fact the only, purpose for which it was erected. By a simple act of the legislature, without judicial proceedings, he is deprived of three-fourths the value of his property, and is told by the State which invited him, with the pretext of equal and just laws, that the industry in which he has invested the savings of a life is illegal and immoral. There is no question here of consequential and remote damages. Nothing in the shape of legislation can be more direct or even brutal than the law of Kansas. It gives no time for preparation—no day in court—but sweeps away his right to manufacture by one single enactment.

In January, 1886, and since this case was brought here, the case of The State of Kansas *vs.* John Walruff *et als.*, identical as to the facts and legal questions herein, has been decided by Judge Brewer, of the Eighth Circuit. The case came before Judge Brewer upon a motion to remand to the District court of Kansas, where an injunction had been prayed by the State to restrain Walruff and others from manufacturing beer.

After reviewing the decisions of this Court, Judge Brewer says:

"But I am not content to leave this case upon these authoritative suggestions of the Supreme Court. As a new matter it is clear to me that there is a Federal question giving right of removal; and here I assert these propositions: First, debarring a man by express prohibition from the use of his property for the sake of the public is a taking of private property for public uses. It is the power to use and not the mere title which gives value to property. Give a man the fee-simple title to a flour mill, coupled with an absolute prohibition on its use, and of what value is it to him? In the most common and ordinary cases of taking private property for public uses, the condemnation of the right of way for a railroad, the title is not divested. The owner still retains the fee-simple, and he is only debarred from the use. When the railroad abandons the use he retakes it."

After quoting the opinion of Justice Miller, in Pumpelly *vs.* Green Bay Co., *supra*, he proceeds:

"In the case of Munn *vs.* Illinois, 94 U. S., 141, Justice Field uses this language: 'All that is beneficial in property arises from its uses; and whatever deprives a person of them deprives him of all that is desirable or valuable in the title and possession. If the constitutional guaranty extends no further than to prevent a deprivation of title and possession, and allows a deprivation of use, and the fruits of that use, it does not merit the encomiums it has received.'

"I meet here the common argument that when private property is taken for public use there is always a transfer of the use from one party to another, that here the use is not

transferred, but only forbidden, and that this deprivation of the use is only one of the consequential injuries resulting from a change of policy on the part of the State for which no compensation or redress is allowed. It is *damnum absque injuria*. The argument is not sound. As a matter of fact, in condemnation cases, seldom is the particular use to which the property has been put transferred. Almost always that use is destroyed in order that another may be acquired. The farmer surrenders a part of his farm to the railroad company, not that the company may continue its use for farming purposes, but that the public may acquire the benefit in another direction; so where land is flowed by a mill-dam. And thus it is generally. Here the use is taken away solely and directly for the benefit of the public. For no other reason and upon no other ground could it be disturbed. Of course, in this as in other cases, some use remains to the owner, but here, as elsewhere, the use which is of special value is taken from him for the benefit of the public. And this is not a consequential result. It is not that the profits of his manufacture are reduced by reason of a prohibition upon sales. The law speaks to him by direct command and says—stop your manufacturing. It is idle to talk of consequential results and injuries when the law in direct language forbids the use of the premises for a brewery.

"I assert secondly that natural equity as well as constitutional guarantee forbids such a taking of private property for the public good without compensation. In the case of the State *vs.* Mugler, 29 Kas., 252, this question was presented to the supreme court of Kansas, and as a member of that court I then expressed this opinion. I am aware that my brethren differed with me, and the court held that the State constitution carried no such proposition. In view of that decision I shall have little to say in respect to the guarantees of the State constitution. I may, however, be permitted to say, and I do it with the highest respect for the members of that court and with the utmost deference to its opinion and judgment, that in the light of the frequent discussions of the question since that decision, and the more I reflected thereon, the more profoundly am I convinced that the guarantees of safety and protection to private property contained within our State constitution forbid that any man should thus be despoiled of that which gives value to his

property for the sake of the public good without first receiving compensation for that which is taken from him.

"Turning to the opinions of other courts I find strong indorsement of the proposition I have asserted. In case of Lake View *vs.* Rose Hill Cemetery Company, 70 Ills., 191, the court says: 'We are unwilling to concede the existence of an indefinable power, superior to the constitution, that may be invoked whenever the legislature may deem the public exigency may require it, by which a party may be capriciously deprived of his property or its use, whether such property consists of franchises or tangible forms of property.

"The constitution of New Jersey contains no such guarantees as ours, yet the supreme court of that State, in Sinnickson *vs.* Johnson, 2 Harrison, 129, declares:

"That this power to take private property reaches back of all constitutional provision, and it seems to have been a settled principle of universal law that the right to compensation is an incident to the exercise of that power; that the one is inseparably connected with the other; that they may be said to exist, not as separate and distinct principles, but as parts of one and the same principle.

"The constitution of New York was similarly deficient, and yet in Gardner *vs.* Newburg, 2 Johns. Ch., 162, Chancellor Kent granted an injunction to prevent the trustees from diverting the water of a certain stream flowing over plaintiff's land from its usual course, because the act of the legislature which authorized it had made no provision for compensating the plaintiff for the injury thus done to his land. After citing several continental jurists on this right of eminent domain he says that, while they admit that private property may be taken for public uses when public necessity or utility requires, they all lay it down as a clear principle of natural equity that the individual whose property is thus sacrificed must be indemnified; and, he adds, that the principles and practices of the English Government are equally explicit on this point.

"Were similar action taken by the State in respect to other industries, I can but think the vigor of constitutional guarantees would seem clearer. In my own city is a large manufacturing establishment, in which hundreds of thousands of dollars have been invested for the making of glucose. This is an inferior kind of sugar, and, in the opinion

of some, a deleterious article; but the industry is legal, the manufacture not forbidden. Suppose the next legislature should believe that glucose was injurious to the public health and forbid its manufacture, could the wheels of that manufactory be stayed and the value of that investment be destroyed without compensation? Take also the illustration of playing-cards, which by reason of their use for gambling purposes are, in the judgment of many good people, a bane to society. If a factory for their manufacture was established, when, as now, a perfectly legal industry, would the owner hold his investment subject to the opinions of perhaps a temporary majority?

"Or take a still stronger illustration: This is a corn-growing State, yet wheat is also raised abundantly, and many flour-mills exist. Suppose the legislature should determine that the best interests of the State would be promoted by stopping the growing of wheat and increasing the crop of corn, and to that end should prohibit the milling of flour, must the owners without compensation abandon their milling and sacrifice their investment? Does not natural justice, as well as constitutional guarantee, compel compensation as a condition to such sacrifice? Yet who can state what the law will recognize as a legal distinction between those cases and this? Of course, it will be said that no legislature would ever think of such extreme and unreasonable action. But the question for courts to determine is not what is likely to be done, but what can be done.

"Thirdly, I affirm that no matter what legislative enactments may be had, what forms of procedure, judicial or otherwise, may be prescribed, there is not 'due process of law,' if the plain purpose and inevitable result is the spoliation of private property for the benefit of the public without compensation. It is a mistake to say that the forms of law alone constitute 'due process.' No complete and perfect definition of the phrase 'due process of law" has yet been given. The most familiar, and one for ordinary cases sufficiently accurate, is that given by Daniel Webster in the celebrated Dartmouth College Case, the 'law of the land' being substantially equivalent to 'due process of law,' as follows: 'By the law of the land is meant the general law, which hears before it condemns, which proceeds upon inquiry, and renders judgment only upon trial.'

"But, as said by Mr. Justice Miller, in Davidson *vs.* New

Orleans, 96 U. S., 104, it is probably better 'to leave the meaning to be evolved by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded.'

"In the same case, Mr. Justice Bradley adds these words: 'In judging what is 'due process of law,' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain or the power of assessment for local improvements, or none of these; and, if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law;' but if found to be arbitrary, oppressive, and unjust it may be declared to be not 'due process of law.'

"In Murray's Lessee *vs.* Hoboken L. & I. Co., 18 How., 266, the Supreme Court thus limits the meaning of the phrase:

"'The Constitution contains no description of these processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative, as well as on the executive and judicial powers of the Government, and cannot be so construed as to leave Congress free to make any process "due process of law" by its mere will.'

"Now, in the case at bar, while judicial proceedings are prescribed, yet the spoliation is the direct command of the legislature, and the judicial proceedings are only the machinery to execute that command. No discretion is left to the courts. The legislature has in terms said to defendants, stop your use of your brewery, and has directed the courts to enforce that command. There is nothing but mere machinery between the legislative edict and an unused valueless manufactory. As well might the executive as the courts be charged with the enforcement of this command. Such a command, no matter how enforced, operates to deprive the citizen of the value of his property without compensation, is, in the language of Mr. Justice Bradley, *supra*, 'arbitrary, oppressive, and unjust,' and therefore should be 'declared to be not due process of law.'"

State *vs.* Walruff *et al.*, 26 Fed. Rep., 178.

It is deemed unnecessary to discuss further the meaning of the term "due process of law." That has been done in the first part of this argument, and nothing can be added to what is so forcibly expressed by Judge Brewer.

That the questions presented are of the gravest nature, and that great difference of opinion has arisen in regard to them admit of no doubt.

Even so eminent and experienced a jurist as Judge Cooley, says:

"Perhaps there is no instance in which the power of the legislature to make such regulations as may destroy the value of property, without compensation to the owner, appears in a more striking light than in the case of these statutes. The trade in alcoholic drinks being lawful, and the capital employed in it being fully protected by law, the legislature then steps in and by an enactment based on general principles of public utility annihilates the traffic, destroys altogether the employment, and reduces to a nominal value the property on hand. Even the keeping of that for the purpose of sale becomes a criminal offense, and without any change whatever in his own conduct or employment the merchant of yesterday becomes the criminal of to-day, and the very building in which he lives and conducts the business, which to that moment was lawful, becomes the subject of legal proceedings, if the statute shall so declare, and liable to be proceeded against for a forfeiture. A statute which can do this must be justified upon the highest reasons of public benefit, but whether satisfactory or not they address themselves exclusively to the legislative wisdom."

Cooley on Constitutional Limitations, 583.

The high character of the writer of the above as a jurist and commentator forbids the suspicion that he meant to declare that the legislature could so exercise the police power as to destroy vested rights of property without compensation and that the citizen is left without redress in the courts. It is true that the legislature may, in its discretion, enact such laws as it may deem proper, but its power is limited by constitutional provisions, and there are personal and property rights beyond and above its control.

No legislature can prevent the citizen from manufacturing any article, the manufacture of which does not endanger or affect the lives or property of others. Nor can any legislature deprive the citizen of vested rights in property without compensation.

It is not claimed that the plaintiff in error, in the language of the learned judge who delivered the opinion of the supreme court of Kansas, "could go on with or without legislation and with or without a license manufacturing beer forever," or that "he founds his right to continue to manufacture beer solely and exclusively upon his supposed vested right to operate his brewery in undisturbed tranquility forever." No such claim has ever existed except in the judicial imagination.

But the plaintiff does claim most earnestly and confidently that his right to operate his brewery, as vested in him by the laws of Kansas, cannot be taken away by the State without just compensation. For an exhaustive discussion of the question see—

Wynhamer *vs.* The People, 13th Ker., 378.
Beebe *vs.* State, 6th Ind., 501.

Tenement House Cigar Cases. 98. Ny. 98.

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No. 211 & 212

IN THE SUPREME COURT
OF THE UNITED STATES.

PETER MUGLER, *Plaintiff in Error,*
vs.
STATE OF KANSAS, *Defendant in Error.*
} No. 211 & 212

IN ERROR FROM THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

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vs.
STATE OF KANSAS, *Defendant in Error*. } *No.* ——.

IN ERROR FROM THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

CASE STATED.

THE defendant, Peter Mugler, was prosecuted criminally in two different cases for the violation of the prohibitory liquor law of the State of Kansas. In the first case, the indictment contained one count, charging that the defendant "did unlawfully manufacture and did assist and abet in the "manufacture of certain intoxicating liquors on, to wit, the "1st day of November, A. D. 1881, in violation of the pro- "visions of an act entitled 'An act to prohibit the manufac- "ture and sale of intoxicating liquors, except for medical, "mechanical and scientific purposes, and to regulate the manu- "facture and sale thereof for such excepted purposes.'" The trial was had in this case before the court without a jury, upon

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BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

CASE STATED.

THE defendant, Peter Mugler, was prosecuted criminally in two different cases for the violation of the prohibitory liquor law of the State of Kansas. In the first case, the indictment contained one count, charging that the defendant "did unlawfully manufacture and did assist and abet in the "manufacture of certain intoxicating liquors on, to wit, the "1st day of November, A. D. 1881, in violation of the pro- "visions of an act entitled 'An act to prohibit the manufac- "ture and sale of intoxicating liquors, except for medical, "mechanical and scientific purposes, and to regulate the manu- "facture and sale thereof for such excepted purposes.'" The trial was had in this case before the court without a jury, upon

an agreed statement of facts, which statement of facts is as follows:

"It is hereby stipulated and agreed that the facts in the above-entitled case are and that the evidence would prove them to be as follows:

"That the defendant, Peter Mugler, has been a resident of the State of Kansas continually since the year 1872. That, being foreign born, he in that year declared his intention to become a citizen of the United States, and always since that time, intending to become such citizen, he did, in the month of June, 1881, by the judgment of the District Court of Wyandotte county, Kansas, become a full citizen of the United States and of the State of Kansas.

"That in the year 1877, said defendant erected and furnished a brewery on lots Nos. 152 and 154, on Third street, in the city of Salina, Saline county, Kansas, for use in the manufacture of an intoxicating malt liquor, commonly known as beer.

"That such building was specially constructed and adapted for the manufacture of such malt liquor, at an actual cost and expense to said defendant of ten thousand dollars, and was used by him for the purpose for which it was designed and intended, after its completion in 1877 and up to May 1, 1881; that said brewery was at all times after its completion and on May 1, 1881, worth the sum of ten thousand dollars for use in the manufacture of said beer, and is not worth to exceed the sum of twenty-five hundred dollars for any other purpose; that said defendant, since October 1, 1881, has used said brewery in the manner and for the purpose for which it was constructed and adapted, by the manufacture therein of such intoxicating malt liquors, and at the time of the manufacture of said malt liquor said defendant had no permit to manufacture the same for medical, scientific or mechanical purposes as provided by chapter 28 of the laws of 1881.

"And the foregoing was all the evidence introduced in this case, and upon which a finding of guilty was made."

The defendant was found guilty and fined $100, and appealed to the Supreme Court of the State of Kansas, where the court below was affirmed. A writ of error was sued out, upon the grounds that the proceedings in said suit involved the validity of a constitutional enactment of the State of Kansas, and of a statute of said State, the defendant claiming that

said constitutional enactment and statute are in violation of the constitution of the United States, and the judgment of said Supreme Court of the State of Kansas being in favor of the validity of said enactment and statute.

Plaintiff in error invoked in the argument before the Supreme Court of the State of Kansas a portion of the first section of the fourteenth amendment to the Constitution of the United States, which provides: "Nor shall any State de- "prive any person of life, liberty or property without due "process of law."

The amendment to the Constitution of the State of Kansas which is complained of is as follows:

"The manufacture and sale of intoxicating liquors shall be forever prohibited in this State, except for medical, scientific and mechanical purposes." (Article 15, sec. 10, Constitution of the State of Kansas.)

This amendment was adopted by the people November 2, 1880. The statute complained of is chapter 128 of the laws of Kansas, passed in 1881. That statute became operative May 1, 1881. Section eight of that statute is as follows:

"Any person, without taking out and having a permit to manufacture intoxicating liquors as provided in this act, who shall manufacture, or aid, assist or abet in the manufacture of any of the liquors mentioned in section one of this act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall suffer the same punishment as provided in the last preceding section of this act for unlawfully selling such liquors."

Section five of that statute is as follows:

"No person shall manufacture or assist in the manufacture of intoxicating liquors in this State, except for medical, scientific or mechanical purposes. Any person or persons desiring to manufacture any of the liquors mentioned in section one of this act, for medical, scientific and mechanical purposes, shall present to the probate judge of the county wherein such business is proposed to be carried on, a petition asking a permit for such purpose, setting forth the name of

the applicant, the place where it is desired to carry on such business, and the kind of liquor to be manufactured. Such petition shall have appended thereto a certificate, signed by at least twelve citizens of the township or city where such business is sought to be established, certifying that such applicant is a person of good moral character, temperate in his habits, and a proper person to manufacture and sell intoxicating liquors. Such applicant shall file with said petition a bond to the State of Kansas, in the sum of ten thousand dollars, conditioned that, for any violation of the provisions of this act, said bond shall be forfeited. Such bond shall be signed by said applicant or applicants as principal or principals, and by at least three sureties, who shall justify under oath in the sum of seven thousand dollars each, and who shall be of the number signing said petition. The probate judge shall consider such petition and bond, and, if satisfied that such petition is true and that the bond is sufficient, may in his discretion grant a permit to manufacture intoxicating liquors for medical, scientific and mechanical purposes. The said permit, the order granting the same, and the bond and justification thereon, shall be forthwith recorded by said probate judge in the same manner and with like effect as in a case of a permit to sell such liquors as provided in section two of this act; and the probate judge shall be entitled to the same fee for his services, to be paid by the applicant. Such manufacturer shall keep a book wherein shall be entered a complete record of the liquors manufactured by him, the sales made, with the dates thereof, the name and residence of the purchaser, the kind and quantity of liquors sold, and the price received or charged therefor. An abstract of such record, verified by the affidavit of the manufacturer, shall be filed quarterly in said probate court, at the end of each quarter during the period covered by such permit. Such manufacturer shall sell the liquor so manufactured only for medical, mechanical and scientific purposes, and only in original packages. He shall not sell such liquors for medical purposes except to druggists who at the time of such sale shall be duly authorized to sell intoxicating liquors as provided in this act; and he shall sell such liquors to no other person or persons, associations or corporations, except for scientific or mechanical purposes, and then only in quantities not less than five gallons."

This statute and this constitutional amendment have received a construction at the hands of the Supreme Court of the State

of Kansas. In the *Prohibitory Amendment Cases*, 24 Kas., and in the case at bar, 29 Kas. 252, the Supreme Court of Kansas has declared the effect and meaning of these enactments, has defined the rights and liabilities of citizens, and has set forth clearly and completely the force and effect of prior liquor legislation.

We suppose that this court will accept the construction put upon the various statutes by the Supreme Court of Kansas, so far as that construction defines the privileges and liabilities of Peter Mugler under the old law and under the new, and will merely determine the question whether those new laws, so construed, have withdrawn from Peter Mugler any privileges or rights guaranteed him by the Constitution of the United States.

The following extract is from the opinion of the Kansas Supreme Court, filed in this case:

"This brings us to a comparison between the former restrictive and prohibitory liquor laws of this State, and the present restrictive and prohibitory liquor laws. In 1877, when the defendant erected his brewery, he had a right to manufacture all the beer or other intoxicating liquors which he chose; and he can do so still, provided he first obtains a permit therefor from the probate judge, and he can easily obtain the permit by complying with the terms and conditions upon which permits are issued. At that time he could manufacture intoxicating liquors for any purpose which he chose, but since the adoption of the constitutional amendment in November, 1880, he can manufacture such liquors only for medical, scientific and mechanical purposes. His right to sell intoxicating liquors, however, was always restricted. In 1877, under the then existing laws, he had no right to sell his beer or any other intoxicating liquor in any quantity, or in any place in Kansas, or to any person, unless he had first obtained a license therefor. (*The State v. Volmer*, 6 Kas. 371; *Dolson v. Hope*, 7 Kas. 161; *Alexander v. O'Donnell*, 12 Kas. 608.) And such is still the law. The license is now called a 'permit.' But even with a license the defendant had no right under the old laws to sell his beer on Sundays, or on election days, or on the fourths of July; or to any person who was in the habit

of becoming intoxicated against the known wishes of his wife, child, parent, brother or sister; or to any minor against the consent of his parent or guardian; or at any place except the place designated in his license, which in the present case would have been the city of Salina. Besides, the defendant had no assurance under the old laws that he could procure a license. Licenses were not granted to anybody and everybody, but only to a select few, and then the license would continue in force for a period of one year only, and no person could have any assurance that his license would be renewed. Both the issuing and the renewal of licenses depended entirely upon the temper and disposition of the community in which the application was made. Under the old laws, each community was given the privilege of determining for itself whether licenses to sell intoxicating liquors should be issued, or not, and if none were issued, then the old law was as much a prohibition law as the present liquor law. The old law might properly be called not only a license law, but also an option law, and a contingent prohibition law—for licenses were allowed to be issued at the option of each community; and if they were not issued the law would become a virtual prohibition law. Under the old law the entire State might have become a complete prohibition State, at the option of its several communities, or each community might have authorized the issue of licenses, as it chose. In this respect the old law and the present law differ. The old law left the question of prohibition or license with each community, separately and exclusively, while the present law theoretically enforces prohibition upon all communities, whether they are willing or unwilling. We do not here wish to be understood as saying that our present liquor law, or any liquor law which we have ever had in Kansas, is or has been an absolute and unqualified prohibitory liquor law. None of them have been more than limited and qualified prohibition laws. Under the old law, the defendant, with a license, could sell his beer to any person and to all persons, with the exceptions heretofore mentioned, but under the present law, we suppose he is subject to at least one other restriction in his sales as to persons. He cannot now sell his beer for medical purposes, except to druggists. It would seem, however, that with a permit he may now sell his beer, for scientific and mechanical purposes, to any and every person who might wish to purchase the same. And therefore it would seem that in this respect no additional restrictions over the old law are imposed. We think it will now appear that the old law and the new are not so vastly

different as has been by some persons supposed. Both restrict sales as to times, places and persons, and the present law as to purposes; and yet both laws allow sales to be made. Under the old law the defendant never had any authority to sell his beer, except with a license. He never had any positive assurance that a license would be granted to him, or if granted that it would be extended or renewed; and even with a license he could not sell his beer at any other place than at the city of Salina. And his right to sell beer for any considerable length of time was always based upon many uncertainties and contingencies. Under the present law, the defendant, with a permit, which he can easily obtain, can manufacture all the beer for medical, scientific and mechanical purposes which he chooses to manufacture, and can sell the same for such purposes, provided he can find purchasers therefor. The material restrictions imposed by the present law, in addition to those imposed by the old law, are simply as to the purposes for which he may sell, and as to the persons to whom he may sell for medical purposes. There are no other material or substantial restrictions."

ARGUMENT.

The portion of the Constitution upon which plaintiff in error relies is as follows:

"*Nor shall any State deprive any person of life, liberty or property without due process of law.*"

I.

Meaning of the word "Property" as used in the Amendment.

"The third absolute right, inherent in every Englishman, is that of property, which consists in the free use, enjoyment and disposal of all his acquisitions, without any control or diminution save only by *the law of the land.*" (Blackstone's Commentaries, 138.)

We believe that these words reveal the precise force and meaning of the word "property" as used in the fourteenth amendment. When that amendment was adopted, the Federal and State courts had generally and clearly recognized the police power of the State. This power was recognized as

a part of *the law of the land.* The idea of liberty carried with it and was limited by the idea of the police power of the State; and the idea of property consisted of two attributes, the right of use and the right of disposal, each modified by the idea of the police power of the State. The police power at the time of the adoption of the amendment was a component part of the idea of property.

The word "property" has two distinct aspects. Considered objectively it stands for the tangible, physical thing. Considered subjectively it is the right of the person in regard to that thing. And the right of the person in regard to that thing is a two-fold right:

1. The right to sell.
2. The right to use.

And these rights are understood as limited by whatever police power in the State was generally recognized in the jurisprudence of America at the time of the passage of the amendment.

That power is discussed at length hereafter.

II.

What Property had Plaintiff before the Passage of the Law under which He was Convicted?

It does not appear from the agreed statement of facts that Peter Mugler was the *owner* of the brewery when this amendment was passed, or when the offense of which he was convicted was committed, unless ownership is to be inferred from use and occupation. Can he avail himself of the constitutional defense, without making it appear affirmatively that he owned the brewery at the time of committing the offense?

The plea alleges that plaintiff in error erected the brewery, at an expense of ten thousand dollars, and that he has been since that time and now is the owner of said property.

The agreed statement of facts, while in the main admitting the allegations of the plea, is silent as to ownership.

The question was not raised before the Supreme Court of the State. Is there not the same ground for concluding that this is merely a moot case that there was for concluding the case of *Bartemeyer v. Iowa* to be so?

But suppose this court concludes that there is sufficient evidence here to show ownership before the passage of the law, and continuous ownership thereafter, down to and including the date when the misdemeanor was committed, what were plaintiff's rights with respect to this brewery before the passage of the prohibitory law, and at the time when he made his investment? Those rights, and the nature of the tenure by which he held them, are set forth in the opinion of the Supreme Court of Kansas filed herein.

We hold: First, that he had the right to sell his brewery. Second, that he had the right to use it for the purposes for which it was erected; but that this right was limited by the general police power of the State, as well as the statutes of Kansas, and that by reason of that police power, and by reason of the statute law of the State in force at the time this brewery was erected, this right was a defeasible and precarious right—a mere privilege or license.

1. We hold, that the common law of England, that the courts and legislatures of the States, that this court and the Congress of the United States, had by a multitude of decisions and enactments, branded the right to manufacture and sell intoxicating liquors as a peculiarly temporary, defeasible and transient right, as particularly subject to the police power and the will of the people.

2. We hold that plaintiff's right to use his brewery for the purposes for which it was erected was, *under the statutes of Kansas*, in fact no right at all, but a mere license.

It is said by the Supreme Court of Kansas, in this case, that before the present prohibition laws there was no direct statutory restriction upon the manufacture of intoxicating liquors. But it will also be seen from this opinion that the *sale* was always closely restricted. Sale was a privilege; it was upon license; it depended upon the arbitrary will of the community. (*Mugler* v. *State*, 29 Kansas, 252.) The privilege to sell is all that makes manufacture possible or desirable. This court said, in *Brown* v. *Maryland*, 12 Wheat. 419, that "sale is the object of all importation of goods, and "the power to allow importation must therefore imply the "power to authorize the sale of the thing imported; that "consequently a penalty inflicted for selling an article in the "character of an importer is in opposition to the act of Con- "gress which authorizes importation."

So in this case we think it must be said that *sale* is the object of manufacture, and that if this court has power to allow plaintiff to manufacture, it must by implication have power to authorize the sale of the thing manufactured. *Sale* of liquors manufactured was the real aim of plaintiff's investment, and the premises were adapted to the manufacture of liquors for sale; the privilege to sell what was manufactured was what induced this investment and what made valuable this brewery. At the time this investment was made the privilege to sell or give away intoxicating liquors was a wholly conditional, contingent and defeasible one. The substantial value of this investment lay in the privilege to sell; and this privilege the statutes of Kansas distinctly pronounced to be a privilege and in no sense a right, a privilege wholly subject to the police power of the State. Sale of intoxicating liquors was *tolerated* by the law of the State under certain conditions. That was all.

Sale is the object of manufacture. Without the privilege of

sale, the privilege of manufacture is barren. In *Brown v. Maryland*, supra, this court, construing the Constitution, and, in accordance with the established rule, construing it strictly, declares a State statute unconstitutional; and that decision is based upon the proposition that the sale is the object of importation, in spite of the fact that some importations might be for the private use of the importer, or for the purpose of sending into another State than the one into which the importation was made.

Will not this court, then, hold to a similar proposition, invoked in defense of a State statute? No claim is here made that plaintiff in error built his brewery for the purpose of manufacturing for his own use; and such a claim, if made, would be nothing short of absurd. When some plaintiff comes here, who has been indicted for brewing beer, which it appears was for his own use, then, at all events, will be time enough to enter into that question.

But Judge BREWER, in *State v. Walruff*, 26 Federal Reporter, page 178, says: "Counsel claimed that the right to "manufacture without the right to sell was a barren right. "Whatever limitations may exist in Kansas, the markets of "the world are open; and with such markets, the right to "manufacture is far from a barren right." While the privilege to manufacture for sale within the State may have been a mere license—a privilege which the State might at any time withdraw—that plaintiff still has an absolute right to manufacture for sale outside the State.

To which we reply:

1. *A State in the enactment of law contemplates the existence of no other sovereignty than itself.* Thus, the Supreme Court, in *Bartemeyer v. Iowa*, 18 Wall. 129, intimates that an enactment in that State prohibiting sale takes away *all*

right to sell, notwithstanding there are many other markets for liquor outside that State. See also *Wynhamer v. People*, 13 N. Y. 378.

2. It does not appear in this case that plaintiff had the commercial power to sell outside the state—that he was so situated as to be able to do so with profit. The contrary would appear to be true from all the facts which appear in this case. The brewery cost only ten thousand dollars, and was situated in the very center of the State, remote from all outside markets.

At the time the brewery was erected, the right to sell was a defeasible right, or rather, defendant had a mere privilege to sell. The State had reserved the right to withdraw this privilege at any time. (29 Kas. 252.)

The privilege to *manufacture* was not, it is true, in terms restricted; but by a clear and indubitable inference it was; there was a *de facto*, a commercial limitation. The case of *Beer Co. v. Massachusetts* holds that the grant of right to manufacture carried with it right to sell. We apprehend, then, that a restriction on the right to sell is a restriction on the manufacture. The law made this limitation by fair inference. Sale is the object of manufacture. Without the privilege to sell, plaintiff could not, in the very nature of things, continue the manufacture.

The Supreme Court, in *Beer Co. v. Massachusetts*, 97 U. S. 32, says: "The right to manufacture includes the incidental right to dispose of the liquors manufactured." To take away the right to sell is to take away, *de facto*, the right to manufacture for sale.

We conclude, therefore, that the right of defendants to manufacture for sale was a defeasible, conditional right, as was the right to sell, subject at all times to be withdrawn.

We conclude further, that before the enactment of the prohibitory statutes, plaintiff had the privilege to use this brewery:

1. In the manufacture of liquors for sale as a beverage.

2. In the manufacture of liquors for sale for medical, mechanical and scientific purposes.

But these privileges were defeasible, impliedly, under the general police power of the State, and expressly under the statutes of Kansas. Plaintiff made his investment with the knowledge and in the face of this state of the law.

III.

Of what Property was Plaintiff in Error deprived by the Prohibitory Law?

It is not claimed that plaintiff in error is deprived of any property objectively considered. He still has possession of his brewery.

It is not claimed that plaintiff is deprived of his brewery subjectively considered, so far as the right to sell it is concerned.

It is not claimed that plaintiff is deprived of his property by being deprived of its use generally.

The only claim is that defendant has been deprived of one particular use, of one particular privilege.

That privilege is the privilege to use his brewery for the manufacture of liquors for sale as a beverage.

This is the construction put upon the constitutional amendment and the prohibitory statute by the Supreme Court of Kansas. They say in the opinion filed in this case:

"In 1877, when the defendant erected his brewery, he had a right to manufacture all the beer or other intoxicating liquor which he chose; and he can do so still, provided he first obtains a permit therefor from the probate judge; and

he can easily obtain the permit by complying with the terms and conditions upon which permits are issued. At that time he could manufacture intoxicating liquors for any purpose which he chose; but since the adoption of the constitutional amendment, in November, 1880, he can manufacture such liquors only for medical, scientific and mechanical purposes. His right to sell intoxicating liquors, however, has always been restricted."

The Supreme Court of Kansas says that plaintiff in error may still manufacture for sale as a medicine. But suppose the practical effect of the law is, to deprive plaintiff in error of the right to manufacture as a medicine, still we contend that he has not been deprived of any "property" within the meaning of the constitution. The object of manufacture is sale. Manufacture is a commercial term which carries with it the idea of sale. Everything in this case indicates that sale within the State was the sole and only purpose that plaintiff could have had in erecting his brewery, and using it in the manufacture of intoxicants.

This court has decided that the absolute prohibition of the sale of intoxicating drinks is not contravened by anything in the Constitution of the United States. (*Foster v. Kansas*, 112 U. S. 201; *Beer Company v. Massachusetts*, 97 U. S. 25; *Bartemeyer v. Iowa*, 16 Wall. 129.)

In *Foster v. The State*, this court says:

"As the question of the constitutionality of the statute was directly raised by the defendant, and decided against him by the court, [the Supreme Court of Kansas,] we have jurisdiction, and the motion to dismiss must be overruled; but as every one of the questions which we are asked to consider has been already settled in this court, the motion to affirm is granted. In *Bartemeyer v. Iowa*, 18 Wall. 129, it was decided that a State law prohibiting the manufacture and sale of intoxicating liquors was not repugnant to the Constitution of the United States. This was reaffirmed in *Beer Company v. Massachusetts*, 97 U. S. 25, and that question is now no longer open in this court."

Plaintiff in error has not been deprived of any property, but only of a privilege which, both by the statutes of Kansas and the common law, was always defeasible.

IV.

The Law was within the Police Power of the State.

We have urged that the word "property," as used in the fourteenth amendment, is, by any proper definition, limited by the police power of the State; that the word is used in that amendment with reference of a generally conceded power in the State to restrict the use of property as it has been restricted in Kansas.

It has been said by this court that the fourteenth amendment was not intended to interfere with the police power of the State.

It may be asserted that the proper exercise of the police power is "due process of law."

If either of these propositions stands—and it matters not which—it becomes necessary to examine the decisions which define this police power, unless indeed the court shall have determined that the statutes of Kansas were such when Mugler made his investment that he has no cause of complaint, be the general police power what it may.

Some Decisions Prior to the 14th Amendment.

Prior to the adoption of the fourteenth amendment, it was fully conceded by the Supreme Court of the United States that the regulation of the liquor traffic was purely and exclusively a matter of State control. As early as the *License Cases*, 5 How. 504, 631, decided in 1846, Justice GRIER said:

"It has been frequently decided by this court that the powers which relate to merely municipal regulations, or what may more properly be termed internal police, are not surrendered

by the State or restrained by the Constitution of the United States, and that consequently, in relation to these, the authority of a State is complete, unqualified and conclusive. Without attempting to define what are the peculiar subjects or limits of this power, it may safely be affirmed that every law for restraint and punishment of crime, for the preservation of public peace, health, and morals, must come within this category."

And in the same cases Mr. Justice McLEAN said:

"And if the foreign article be injurious to the health or morals of the community, a State may, in the exercise of that great and conservative police power which lies at the foundation of its prosperity, prohibit the sale of it."

Mr. Justice CATRON held:

"I admit as inevitable, that, if the State has the power to restrain by licenses, she has the discretionary power to judge the limit, and she may go to the length of prohibiting sales altogether, if such be her policy; and that, if this court cannot interfere in the cases before us, so neither could we interfere in the extreme case of entire exclusion, except to protect imports belonging to foreign commerce, as already defined."

Mr. Justice WOODBURY said:

"From the first settlement of this country, and in most other nations, ancient or modern, civilized or savage, it has been found useful to discountenance excess in the use of intoxicating liquor. And without entering here into the question whether legislation may not, on this as other matters, become at times intemperate and react injuriously to the salutary objects sought to be promoted, it is enough to say, under the general aspect of it, that the legislation here is neither novel or unextraordinary, nor apparently designed to promote other objects than physical, social and moral improvement. On the contrary, its tendency clearly is to reduce family expenditures, secure health, lessen pauperism and crime, and coöperate with rather than counteract the apparent policy of the General Government itself in respect to the disuse of ardent spirits. They aim then at a right object. They are calculated to promote it. They are adapted to no other. And no other or sinister or improper view can, therefore, either with delicacy or truth, be imputed to them. But I go further on this point than some of the court, and wish to meet the case in front and in ts worst bearings. If, as in the view of some, these license

laws were really in the nature of partial or entire prohibitions to sell certain articles within the limits of the State, as being dangerous to public health and morals, or were virtual taxes upon them as State property, in a fair ratio with other taxation, is does not seem to me that their conflict with the constitution would by any means be clear."

Mr. Justice GRIER used this emphatic language:

"It is not necessary, for the sake of justifying the State legislation now in consideration, to array the appalling statistics of misery, pauperism and crime, which have their origin in the use and abuse of ardent spirits. The police power, which is exclusively in the State, is alone competent to the correction of these great evils, and all measures of restraint or prohibition necessary to effect the purpose are within the scope of that authority. There is no conflict of power or of legislation as between the State and the United States."

Judge COOLEY, before the adoption of the fourteenth amendment, said:

"Those statutes which regulate or altogether prohibit the sale of intoxicating drinks as a beverage, have also been supposed to conflict with the Federal Constitution. Such of these, however, as assume to regulate only, and to prohibit sales by other persons than those who should be licensed by the public authorities, have not suggested any serious question of constitutional power. They are but the ordinary police regulations, such as the State may make in respect to all classes of trade or employment.

"It would seem that the State laws known as prohibitory liquor laws, the purpose of which is to prevent altogether the manufacture and sale of intoxicating drinks as a beverage, so far as legislation can accomplish that object, cannot be held void as in conflict with the power of Congress to regulate commerce and to levy imposts and duties. And it has been held that they were not void, because tending to prevent the fulfillment of contracts previously made, and thereby violating the obligation of contracts.

"The same laws have also been sustained when the question of conflict with State constitutions or with general fundamental principles has been raised. They are looked upon as police regulations established by the legislature for the prevention of intemperance, pauperism, and crime, and for the abatement of nuisances. (*Commonwealth v. Kendall*, 12 Cush. 414; *Commonwealth v. Clapp*, 5 Gray, 97; *Commonwealth v.*

Howe, 13 Gray, 26; *Santo v. State*, 2 Iowa, 202; *Our House v. State*, 4 Greene [Iowa], 172; *Zumhoff v. State*, id. 526; *State v. Donehey*, 8 Iowa, 396; *State v. Wheeler*, 25 Conn. 290; *Reynolds v. Geary*, 26 Conn. 179; *Oviatt v. Pond*, 29 Conn. 479; *People v. Hawley*, 3 Mich. 330; *People v. Gallagher*, 4 Mich. 244; *Jones v. People*, 14 Ill. 196; *State v. Prescott*, 27 Vt. 194; *Lincoln v. Smith*, id. 328; *Gill v. Parker*, 31 Vt. 610. But see *Beebe v. State*, 6 Ind. 501; *Meshmeyer v. State*, 11 Ind. 484; *Wynehamer v. People*, 13 N. Y. 378.)

"In *Reynolds v. Geary*, 26 Conn. 179, it was held that the State law forbidding suits for the price of liquors sold was to be applied to contracts made out of the State, and lawful where made.

"It has also been held competent to declare the liquor kept for sale a nuisance, and to provide legal process for its condemnation and destruction, and to seize and condemn the building occupied as a dram-shop on the same ground. (*Our House v. State*, 4 Greene [Iowa], 172. See also *Lincoln v. Smith*, 27 Vt. 328; *Oviatt v. Pond*, 29 Conn. 479; *State v. Robinson*, 33 Maine, 568; *License Cases*, 5 How. 589. But see *Wynehamer v. People*, 13 N. Y. 378; *Welch v. Stowell*, 2 Doug. [Mich.] 332.)

"Perhaps there is no instance in which the power of the legislature to make such regulations as may destroy the value of property, without compensation to the owner, appears in a more striking light than in the case of these statutes. The trade in alcoholic drinks being lawful, and the capital employed in it being fully protected by law, the legislature then steps in, and, by an enactment based on general reasons of public utility, annihilates the traffic, destroys altogether the employment, and reduces to a nominal value the property on hand. Even the keeping of that for the purposes of sale becomes a criminal offense, and, without any change whatever in his own conduct or employment, the merchant of yesterday becomes the criminal of to-day; and the very building in which he lives and conducts his business, which to that moment was lawful, becomes, perhaps, a nuisance, if the statute shall so declare, and liable to be proceeded against for a forfeiture. A statute which can do this must be justified upon the highest reasons of public benefit; but whether satisfactory, or not, they rest exclusively in the legislative wisdom." (Cooley on Constitutional Limitations, ed. 1868, pp. 581, 583, and 584.)

In *People v. Hawley*, 3 Mich. 330, a case almost identical with this case, the court said:

"It is urged by the counsel for the defendant that, having a large investment of money in buildings and fixtures connected with his business of brewing ale and strong beer, which are useless for any other purpose, the legislature cannot deprive him of the use of his said property for the purpose for which it was designed, without providing compensation for his buildings and fixtures. But we negative this assumption. In the exercise of its police power, a State has full power to prohibit, under penalties, the exercise of any trade or employment which is found to be hazardous or injurious to its citizens and destructive of the best interests of society, without providing compensation to those upon whom the prohibition operates."

It will thus be seen that a police power in every respect is *broad* as that for which we contend was already established long prior to the passage of the fourteenth amendment. The courts generally, at the time of the adoption of the fourteenth amendment, held the word "property" to imply the right to use, and the right to sell, subject to the police power of the State. And a number of State courts and the Supreme Court of the United States had recognized the particular propriety and the clear right of exercising that power upon the liquor traffic. The amendment used the word "property" in this sense and with this limitation, and this was the meaning given the word by Blackstone: "The right "of property consists in the free use, enjoyment and disposal "of all acquisitions without any control or diminution *save* "*only by the law of the land;*" the police power being included in the phrase, the law of the land.

Some Decisions Subsequent to the 14th Amendment.

Speaking of the prohibition liquor law of Massachusetts, passed in 1869, the Supreme Court of the United States says:

"If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the

legislature cannot be stayed from providing for its discontinuance by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the State. Whatever difference of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens and to the preservation of good order and the public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to the class of objects which demand the application of the maxim, '*Salus populi suprema lex*,' and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself." (*Beer Company v. Massachusetts*, 97 U. S. 25.)

In *Barbier v. Connelly*, 113 U. S. 27, Mr. Justice FIELD, delivering the opinion of the court, says:

"The fourteenth amendment, in declaring that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, undoubtedly intended that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness, and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediments should be imposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition; and that, in the administration of criminal justice, no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. *But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries*

of the State, develop its resources, and add to its wealth and prosperity."

The following was a portion of the statement of facts in the case of *Schmidt v. Cobb*, 119 U. S. 292:

"2d. That long prior to the 4th day of July, A. D. 1884, and ever since that time, they have been engaged in the business of brewing beer and selling the same at both wholesale and retail; and they have kept upon the premises mentioned in the petition, being the same premises upon which said beer is manufactured, which said premises have all said time belonged to and are now owned by defendants, and contain large breweries, erected for the purpose of manufacturing beer and for no other purpose, and are suited for no other purpose, a room where said beer so manufactured is kept for sale at retail, which is the keeping of a saloon charged in the petition herein, and not other or different; and defendants claim that such business is legal under the laws of Iowa.

"3d. That they have invested in said business of brewing and selling beer a large sum of money, and there is involved in this case, in addition to the personal rights of defendants, the sum of ten thousand dollars, exclusive of costs, and more than that amount of property belonging to defendants will be rendered entirely worthless if plaintiff succeeds against them in the present action."

And it was further true in that case, that, prior to the legislation complained of, the manufacture and sale of intoxicants, under certain restrictions, was lawful in the State of Iowa. It goes without saying, that to cut off defendant's right to sell was to destroy the value of his brewery. Such is the allegation of facts in the petition for removal, upon which, and the original petition, the case was determined. Yet in that case this court held that there was no Federal question involved.

Inferior Federal courts have held the same doctrines. In *Weil v. Calhoun*, 25 Fed. Rep. 872, Judge McCoy says:

"The great complaint of this bill is that by this law the complainants are deprived of their property and injured in their business, etc. Nothing is better settled, by a large number of decisions of the Supreme Court of the United States,

than that such losses and such damages are not a good objection to the law. The States must have power to legislate for purposes of good order, the preservation of the public health, and a thousand other objects, and it is an every-day event that some man's property is made less valuable—perhaps worthless—by the operation of laws passed by the legislature for the public good. Professions in which men make money and devote their whole time are declared illegal, and are broken up and destroyed, very much to the hurt and pecuniary loss of the persons concerned, and they have no redress. I allude now to the profession of the gambler. So, too, so vastly profitable a business as a lottery, even though protected by a legislative grant, has been broken up by a law prohibiting its exercise, and its property and business dissipated to the winds without any remedy. So of the oleomargarine manufactory, and so of a hundred different investments made under laws not prohibiting them, yet rendered valueless or far less valuable by means of the operation of laws passed by the legislature for the public good, as it supposed. This whole subject of the liquor traffic and investments, precisely like those of the complainants broken up or largely crippled by prohibitory laws, has been a fruitful source of discussion before the courts, and they are all now agreed that such rights and properties as the complainants assert they are about to have injured or destroyed if this law be declared to be of force, are not protected by the Constitution of the United States. (*Passenger Cases*, 7 How. 504; *Beer Co. v. Massachusetts*, 97 U. S. 25; *Slaughter-House Cases*, 16 Wall. 129; *Stone v. Mississippi*, 101 U. S. 814.) This question has been before the Supreme Court of the United States—the court of the last resort in cases of this kind—and that court uniformly and clearly held that rights of the character here set up must yield, however costly and devastating may be the evil, to the will of the Legislature in its passage of laws in their judgment for the public good. It is one of the risks that every man takes in entering a business or making an investment, and he cannot complain.

"That it was competent for the legislature to pass this law, and make it operative in any county accordingly as the people might vote, is now so well settled as not to admit of serious discussion. My own views are stated in the *Brunswick City Case*, 54 Ga. 317."

In *United States v. Nelson*, 29 Federal Reporter, 202, it was held that Congress had power to enact that intoxicating liquors

shall not be manufactured nor sold as a beverage in Alaska; and in the opinion, the court says: "Such laws are regarded "as police regulations, established by the law-making power "for the abatement and prevention of intemperance, and the "consequent and intolerable train of evils which invariably "follow in its wake."

We think this court has held in a long line of decisions that the police power of a State is more than ample to embrace the legislation here complained of. The *License Cases* stamped the liquor traffic as the peculiar subject of that power. To the same effect are *Bartemeyer v. Iowa; Beer Company v. Massachusetts; Foster v. Kansas*, and the recent case of *Schmidt v. Cobb*, supra.

And courts have recognized this power, where the propriety of its exercise was much less obvious than here.

The *Oleomargarine Cases* are recent illustrations. The Supreme Court of Pennsylvania, in the case of *Powell v. Commonwealth*, 26 Am. L. Reg. 83, and the courts of Missouri, in *State v. Addington*, 12 Mo. App. 214, and 77 id. 115, declare the constitutionality of statutes which absolutely prohibited the manufacture and sale of a food product of wide use, because of their apparent design to promote the public morals by preventing fraud in the sale of one article for another.

In the former case, this very question of loss of value of machinery used in the manufacture was distinctly raised in the case, though not adverted to in the opinion.

"The mere fact [the court said in the latter case] that experts may pronounce a manufactured article, intended for human food, to be wholesome or harmless, does not render it incompetent for the Legislature to prohibit the manufacture and sale of the article. The test of the reasonableness of the police regulation prohibiting the making and vending of a particular article of food, is not alone whether it is in part

unwholesome and injurious. If an article of food is of such a character that few persons will eat it knowing its real character; if at the same time it is of such a nature that it can be imposed upon the public as an article of food which is in common use, and against which there is no prejudice; and if, in addition to this, there is probable ground for believing that the only way to prevent the public from being defrauded into the purchasing of the counterfeit article for the genuine, is to prohibit altogether the manufacture and sale of the former, then we think such a prohibition may stand as a reasonable police regulation, although the article prohibited is in fact innocuous, and although its production might be found beneficial to the public, if in trying it they could distinguish it from the product of which it is the imitation."

The ground upon which this legislation was held constitutional was that the manufacture of oleomargarine gave opportunity for and tempted to the perpetration of fraud.

The manufacture of liquor, it is claimed, gives opportunity for and tempts men to the perpetration of crime, and on that ground alone may by the police power of the State be prohibited.

In *State v. Smyth*, 14 R. I. 100, it was decided that a law establishing an arbitrary standard of purity for milk, below which it could not be sold, was constitutional. It was objected that if the natural milk of cows happened to be very thin and below the standard, the deprivation of the sale of such milk was an unjust discrimination against the owner. It was answered, however, that the sale of naturally thin milk as good commercial milk was as much a fraud as if it were actually watered. There was no deprivation of property in taking from the owner of a cow giving very thin milk the right of sale of the milk, since, as intimated by the court, the cow had still some value as an "irrigator" if not as a milk producer. See the following cases, where laws establishing an arbitrary standard of purity for milk have been declared constitutional: *Com. v. Evans*, 132 Mass. 11; *State*

v. Newton, 45 N. J. L. 469; *People v. Cipperly*, 101 N. Y. 634, reversing the Supreme Court in 44 N. Y. S. C. 319.

In *Ex parte Tung Jon*, 28 Federal Reporter, 308, the Circuit Court for the District of Oregon held valid a law which practically threw the same restrictions about the sale of opium which the laws of Kansas throw about the sale of intoxicating liquors. And in that case it appears that the opium sold was on hand prior to the passage of the law, and had been acquired when opium was an ordinary article of merchandise.

Conclusions to Which These Authorities Lead.

Regulations, then, to promote the health, peace, morals, good order and safety of society, are by a long line of decisions, pronounced by this court to be embraced in the police power of the State. And whether we say, in the words of the *Beer Company Case*, that all property rights are held subject to this police power, and the exercise of the power has taken away nothing which inhered in the true notion of property, or whether we say, in the language of *Barbier v. Connolly*, that the amendment was not designed to interfere with this police power, matters not in this case. The thing to be determined is still the same.

Is it clear to this tribunal that this so-called prohibitory liquor law is *not* a regulation to promote the health, peace, morals, good order and safety of society?

The people of Kansas have said, after all the deliberation incident to the adoption of a constitutional amendment, that the manufacture and sale of intoxicating liquors do affect their health, peace, morals, and the good order and safety of society.

The traffic in intoxicants has been the subject of police regulation among English-speaking people for centuries.

It is unnecessary to speak of the terrible multitude of social

and political evils which result more or less proximately from the use of intoxicating liquors. It is not fanaticism, it is history, science and experience which make these evils more and more apparent every year.

This court has already held that laws prohibiting the manufacture and sale of intoxicating liquors are not repugnant to the constitution. (*Foster v. Kansas, Bartemeyer v. Iowa, Beer Company v. Massachusetts.*)

Laws prohibiting these *pursuits* must therefore have been considered *within the police power of the States.*

The liberty to pursue the occupation in which one has become skilled is certainly a dearer and more sacred right than any property right can ever be. Constitutions guard this personal liberty as zealously as the property right. Magna Charta provides that no free man shall be deprived of his life, liberty or property except by the judgment of his peers and the law of the land. Yet the idea of personal liberty, like the idea of property, is always modified by the idea of the police power of the State; and it is undisputed that the brewer, the distiller and the barkeeper may by the legislature be deprived of their ordinary means of livelihood without compensation, no matter how legitimate their callings may have been when they entered upon them.

Are the utensils of a man's calling more sacred than the calling itself? Is the journeyman brewer to be driven from the only pursuit in which he is skilled, but the owner of brewing utensils to be allowed to pursue that same calling merely by virtue of such ownership? The sound doctrine seems to be that all callings and all property are held subject to that power; and accordingly all machinery and property used in manufacture must be held to have been acquired and held subject to such legislation as that complained of in this case.

It is a common argument against prohibitory-liquor legis-

lation, that injury does not *necessarily* flow from the manufacture for sale, or the sale as a beverage, of intoxicating liquors.

We deny both the asserted fact and the conclusion drawn from it. The manufacture and sale of intoxicants as a beverage does inevitable harm to society. It might not if society were other than it is; but the fact remains that it does do injury to society, and that such injury is inevitable—for society is as it is.

Harm was not the necessary result of washing and ironing within the times and limits proscribed in *Barbier v. Connelly*, supra. To many of the community no harm could ever come from the practice prohibited. Harm is not the necessary consequence of the erection of wooden buildings, or the maintenance of a powder magazine, or the operation of a slaughter-house within the limits of a great city. And yet harm is so probable in these things that the police power is held to extend to their prohibition. Many will certainly escape injury from them just as many escape injury from the liquor traffic.

The difficulty in certain cases is in determining whether laws ostensibly designed to advance the public welfare, are not wholly in the interest of private parties. In the celebrated *Slaughter-House Cases*, 16 Wall. 36, it was decided by a bare majority of the Supreme Court of the United States, that a State law which gave a monopoly of the business of keeping a slaughter-house in 1,154 square miles of territory, to one corporation, was sufficiently public in its nature, as relating to public health, to come within the police power. These cases will be more fully considered later on. It is only desired here to call attention to the fact that harm to the community was much less certain from the continuation of the slaughtering business in the old modes, than it is from the manufacture and sale of intoxicating liquors as a beverage. There was a

possibility that a multiplicity of slaughter-houses in different portions of the affected territory would injure the health of some of the inhabitants. Multitudes were certain to be unharmed. Health was the only interest of the community that could be harmed. The liquor traffic is certain not only to beget ill-health, but poverty and crime in the community.

We conclude, then, that the regulation and the prohibition of the manufacture and sale of intoxicating liquors as a beverage, is within the police power of the State; that it was by the jurisprudence of this country and of England, recognized to be within the police power of the State prior to the passage of the fourteenth amendment; and that this power defined, limited and inhered in the notion of property; that it was a part of the definition of property; that the fourteenth amendment to the Constitution of the United States used the word "property" in full recognition of this police power; and that this police power was not withdrawn from the several States by that amendment.

We would urge also that from the considerations of public policy that power ought to be left with the States, and ought not to be limited, and ought not to be withdrawn.

The prohibition of manufacture goes a step farther, perhaps, than the prohibition of sale; but prohibiting the manufacture is adding to the means of enforcement of laws against sale, rather than depriving citizens of any valuable right left them after the right to sell is withdrawn. Granted the right to prohibit sales without compensation to the seller for the loss in value of the utensils of his traffic, and the same right as to the manufacturer must follow. Many things lawful in themselves are properly prohibited because they tend or tempt to actions unlawful in themselves; and nothing seems clearer than that unrestrained manufacture of intoxicants would constantly tend and tempt to the unlawful sale of them.

No laws rest on a sounder public policy than prohibitory liquor laws, where public sentiment is such that they may be enforced. Such legislation is not sumptuary legislation; sumptuary laws were wholly political measures whereby the hereditary rulers of England sought to compel the poor to accumulate money that they might be able to pay heavier tribute to the privileged classes. Prohibitory liquor laws seek to prevent the poor from becoming burdens upon society and enemies to it.

V.

Some Cases Particularly Considered.

In *Boston Beer Co. v. The State of Massachusetts*, 97 U.S. 25, it was decided in 1877 that all rights are held subject to the police power of a State; that if the public safety or the public morals require the discontinuance of any manufacture or traffic, the legislature may provide for its discontinuance, *notwithstanding individuals or corporations may suffer inconvenience;* that as the police power of a State extends to the protection of the lives, health and property of her citizens, the maintenance of good order and the preservation of public morals, the legislature cannot by any contract divest itself of the power to provide for these objects. And the court, reaffirming its decision in the Iowa case, held that as a measure of police regulation, a State law prohibiting the manufacture and sale of intoxicating liquors is not repugnant to any clause of the Constitution of the United States.

All the Justices concurred in this decision.

This case was a proceeding for the forfeiture of certain malt liquors belonging to the Boston Beer Co., which had been seized while being transported to the place of business of the company for purposes of sale, in violation of an act of the legislature, commonly known as the prohibitory liquor law.

This company had been engaged in the manufacture of malt liquors for sixty years at the time the prohibitory liquor law was passed, and had been specially chartered for that purpose by the State. It must be presumed to have made large investments in buildings and machinery adapted to the purposes for which the company was incorporated. Yet Mr. Justice BRADLEY, in delivering the opinion of the court in that case, says:

"The plaintiff in error was incorporated for the purpose of manufacturing malt liquors in their varieties, it is true; and the right to manufacture, undoubtedly, as the plaintiff's counsel contends, included the incidental right to dispose of the liquors manufactured. But, although this right or capacity was thus granted in the most unqualified form, it cannot be construed as conferring any greater or more sacred right than any citizen had to manufacture malt liquor, nor as exempting the corporation from any control therein to which a citizen would be subject, if the interests of the community should require it. *If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance, by any incidental inconvenience which individuals or corporations may suffer.*"

It is to be particularly noticed in regard to this case, that the Beer Company had acquired not only all rights which the citizen ordinarily acquires by investments in a business legitimate at the time of the investment, but these rights had, apparently, been added to by express grant.

The legislative act complained of in the Slaughter-House Cases, contained the following provision: "*All other stock-land-*
"*ings and slaughter-houses within the parishes of Orleans, Jeffer-*
"*son and St. Bernard shall be closed, and it will no longer be*
"*lawful to slaughter cattle, hogs, calves, sheep and goats therein,*
"*under a penalty of one hundred dollars for each and every*
"*offence.*"

In delivering the opinion of the court, Justice MILLER said:

"The plaintiffs in error allege that the statute is a viola-
"tion of the Constitution of the United States in these sev-
"eral particulars; that it deprives them of their property
"without due process of law." And further on he says: "We
"are not without judicial determination, both state and na-
"tional, of the meaning of this clause, and it is sufficient to
"say that under no construction of that provision that we
"have ever seen, or in any that we deem admissible, can the
"restraint imposed by the State of Louisiana upon the exer-
"cise of their trade by the butchers of New Orleans, be held
"to be a deprivation of property, within the meaning of that
"provision."

The four dissenting justices placed their dissent upon the ground that, although the act was entitled "An act to protect "the health of the city of New Orleans, to locate the stock-"landings and slaughter-houses, and incorporate the Crescent "City Live-Stock Landing and Slaughter-House Company," and thereby purported to be a police regulation, yet that this was a mere pretext for the creation and maintenance of a gigantic and unconscionable monopoly, and the invasion of right of the plaintiffs to pursue their lawful calling.

We submit that to prohibit a man from using his stock-landing and his slaughter-house or packing-house for the purposes for which they were specially designed, deprives him of that property to just as great a degree as to prohibit a man from using his brewery for the manufacture of liquors for sale.

In the Slaughter-House cases the record showed that prior to the legislative act complained of, a thousand men were engaged in slaughtering and preparing animals for food, and had money invested in buildings and fixtures adapted to those purposes. Upon the business in which they were engaged

and in which their money was invested, there were no legal limitations or restrictions soever, and no intimation of any.

In this case the plaintiff in error was engaged in a business and had his money invested in a business which was at the time of his investment barely tolerated by law. He knew at the time he made his investment that the laws of this State were such that the right to sell might be withdrawn at any time, and he be rendered powerless to proceed with the manufacture.

The butchers certainly had some reason to believe that they had an absolute, perpetual and unconditional right to engage in and continue in their business, and make use of their property therein.

Mugler had every reason to believe that he had only a contingent, temporary, defeasible privilege to conduct his business, and make use of his property therein.

In those cases the act of the Legislature took away all right to use buildings and fixtures for the purposes for which they were intended.

In this case the act of the Legislature still allowed plaintiff in error to use his property for the manufacture of liquors for medical, mechanical and scientific purposes, provided he could satisfy the probate judge that he was a proper party to receive a permit.

In those cases the privileges taken away were conferred upon a monopoly, according to the opinion of a minority of the court.

In this case there is no claim that a monopoly has been created.

In those cases the legislative enactment provided *expressly* that certain buildings and fixtures should not be longer used for the purposes for which they were designed.

The enactment in this case falls far short of that.

Can this law be held to deprive defendant of property without due process of law, when that did not?

Consequences of Holding the Law Unconstitutional in this Case.

The consequences of holding the statute unconstitutional in this case demand grave and careful consideration. We would first call your attention briefly to the particular results as to restrictive and prohibitory liquor legislation, and afterward to the general results which would follow the establishment of the principle contended for.

Wherever the sale of liquors is at present lawful, such sale could not be materially restricted—much less prohibited—without compensation for the loss in value of utensils used in the traffic.

To impose a license upon the sale, hitherto unrestricted, will be—and that is the very purpose of such measures—to drive some poor dealer out of business, and deprive him of the use of his saloon equipments.

To replace a low license by a high license, or to forbid the sale altogether, except for certain purposes, will have the same effect. In such case, if compensation be refused, the former dealer, by virtue of his property in a few bar-room utensils, will be enabled to continue his business.

If manufacture be prohibited, and no compensation be made, the brewer, who had the good fortune to own the fixtures of a brewery prior to the passage of the law, will be able to pursue his calling safe from the harassment of new competitors. Such of the brewers of Kansas as have retained their property will enjoy a monopoly—for how long? As long as the walls of their buildings stand? or only as long as the *peculiar* utensils of their craft endure? May they buy

new fixtures? When the old machinery wears out, may they buy new? When the old building falls down, may they rebuild? May they enlarge? A new brewery we suppose they may not operate: how long may they operate the old one? Will it be so long as one of the original vats remains in use, or so long as they continue to *own* so much as one of the original vats?

Will the exemption thus extended to Peter Mugler be personal to him, or will it follow the brewery and protect Peter Mugler's heirs or grantees? No man can lawfully erect and operate a new brewery. May he buy and operate an old one? Consistency would seem to demand that the exemption follow the brewery into whosesoever hands it may come; for if Peter Mugler's vendee cannot use the brewery, Peter Mugler will be able to find no purchaser of his brewery as a brewery, and he will still be deprived of his property, in that he cannot sell it.

But suppose the State consent to compensate Peter Mugler: how will the compensation be determined? Will it be the difference between the value of the property before the passage of the law and its value for other than brewing purposes? Or will it be the difference between the value of the brewery coupled with the privilege to manufacture and sell for medical and mechanical purposes, and its value without that right; or the difference between its value coupled with the privilege to manufacture and ship out of the State, and its value without that privilege?

We suppose that this principle, if it be established, will protect others than the brewers. The owners of vineyards will be protected in the manufacture of wine so long as the old vines hold out. Whether they might use the grapes taken from the offspring of the old vines, would be another question.

The owner of land peculiarly adapted to the raising of hops, and furnished with hop poles for that purpose, without question suffered a loss by the passage of the prohibitory liquor law. Is he to be compensated, or if compensation be refused, may he use his hops in the manufacture of beer?

It will be impossible to discuss at length the results which would follow the establishment of the principle contended for by plaintiff in error, at this time. The difficulties in the way, as far as liquor legislation is concerned, have been hastily suggested. In other fields of police regulation, still greater confusion would follow, and just as serious injury be done to society at large. Such a principle would hamper municipal government to an inconceivable extent, and would prove nothing less than a disaster in every progressive community. Experience and the researches of science will constantly reveal new objections to old occupations, and prove this and that new occupation to be harmful to the public welfare. This principle would be an insuperable barrier in the way of all social progress and reform which depended in any respect upon the intervention of public authority. If it is so difficult to check or remove the many social evils which perplex society to-day, how much more difficult would it be when every nuisance and every debasing and debauching pursuit had to be bought out, as well as outlawed.

In the beginning of civilization, the law recognized but one or two crimes and but few rudimentary civil rights. But with the centuries the calendar of crimes has increased, and the scope of the law has widened. Civilization will either grow or decay, and if it grow, we must expect the same process to continue until man reaches his ultimate development and the law has become as refined, as searching, as subtle and unfailing, as kindly and as terrible, as the moral law itself. To declare the property right of an individual more sacred

than the right of the individual to earn his livelihood in the pursuit in which he has become skilled, and more sacred than the health, morals, welfare and good order of society, would be to fasten upon American jurisprudence a Chinese conservatism which, though it must soon be thrown off, can be productive of nothing but harm so long as it remain.

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ADDENDUM.

Privileges and Immunities.

What privileges and immunities were intended to be protected by the second clause of the fourteenth amendment are thus defined, and for the purpose of this argument settled, in the Slaughter-House cases.

It is expressly held that "The second clause protects, from "the hostile legislation of the States, the privileges and im- "munities of citizens of the United States, as distinguished "from the privileges and immunities of citizens of the *States*."

In *Bartemeyer vs. The State of Iowa*, 18 Wallace, 129, the court say:

"The most liberal advocates of the rights conferred by that amendment have contended for nothing more than that the rights of the citizen previously existing, and dependent wholly on State laws for their recognition, are now placed under the protection of the Federal Government, and are secured by the Federal Constitution. The weight of authority is overwhelming, that no such immunity has heretofore existed as would prevent State legislatures from regulating and even prohibiting the traffic in intoxicating drinks, *with a solitary exception*. That exception is the case of a law operating so rigidly on property in existence at the time of its passage, *absolutely prohibiting its sale*, as to amount to depriving the owner of his property. A single case, that of *Wynehamer vs. The People*, 3 Kernan, 486, has held that as to such property the statute would be void for that reason. But no case has held that such a law was void as violating the privileges or immunities of citizens of a State, or of the United States. If, however, such a proposition is seriously urged, we think that the right to sell intoxicating liquors, so far as such right exists, is not one of the rights growing out of citizenship of the United States, and in this regard the case falls within the principles laid down by this court in the Slaughter-House cases."

Case No. 211 cannot, we think, be distinguished from the Bartemeyer case.

The prohibitory *amendment* was adopted and became operative Nov. 2, 1880.

The stipulation as to facts is "That of the beer so manufactured and *on hand prior to Feb'y 19th*, 1881, said defendant made one sale," &c., &c.

The manufacture and sale became unlawful November 2, 1880.

The stipulation does not show that the beer sold was manufactured and on hand prior to November 2, 1880, and therefore seems to stand on all-fours with the Bartemeyer case.

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